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ABSTRACT

This publication contains 17 papers on the impact of collective bargaining on higher education over the past 20 years. The papers are grouped in four sections on the state of unions in higher education, individual and collective rights in the academy, bargaining in the trenches, and overviews of past and present legal issues. The papers are: (1) "Robust Unionism and Unions in Higher Education" by Arthur B. Shostak; (2) "Can Collective Bargaining Help Institutions During a Period of Constrained Resources?" by T. Edward Hollander; (3) "Is Unionization Compatible with Professionalism?" by David M. Rabban; (4) "Changes in the U.S. System of Industrial Relations: Its Impact on Collective Bargaining in Higher Education" by James P. Begin; (5) "Unions in a Battered Academy" by Irwin H. Polishook; (6) "The Impact of the Constitutionalization of Higher Education on Collective Bargaining: Individual Rights vs. Collective Action" by David H. Rosenbloom; (7) "Professional and Legal Limits to Academic Freedom" by Walter P. Metzger; (8) "Academic Freedom: Are There Permissive Parameters to Free Speech in the Academy?" by Timothy Healy; (9) "Peer Review and the Union: Hero or Hostage?" by Barbara A. Lee; (10) "When Collective Bargaining Fails: An Academic Perspective" by David Kuechle; (11) "When Collective Bargaining Fails: A Management Perspective" by Thomas M. Mannix; (12) "Collective Bargaining Is the Name of the Game" by David Newton; (13) "Dispute Resolution in Higher Education Collective Bargaining" by Norman G. Swenson; (14) "The Employee Health Care Cost Crisis" by Michael R. McGarvey; (15) "Seminal Legal Developments of the Past Twenty-Five Years Affecting Higher Education Collective Bargaining" by Ann H. Franke; (16) "Twenty-Five Years of Seminal Legal Developments in Higher Education Collective Bargaining" by Woodley B. Osborne; and (17) "Campus Bargaining and The Law: The Annual Update" by James Cowden. (JB)

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THE IMPACT OF COLLECTIVE BARGAINING ON HIGHER EDUCATION: A TWENTY YEAR RETROSPECTIVE

Proceedings
Twentieth Annual Conference
April 1992

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National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY

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INTRODUCTION

The Twentieth Annual Conference of the National Center focused on a retrospective view of higher education collective bargaining, looking at the beginnings of this movement to the present. During this period, academic collective bargaining has moved from its genesis to being an acknowledged methodology for addressing faculty employment issues. Recognized faculty bargaining agents have increased from a handful of institutions to covering nearly a third of all college campuses in the United States. Though relatively scant growth has occurred over the past several years, the stability of higher education collective bargaining should be measured against the decline of membership in virtually every other sector of the economy. Placing higher education collective bargaining in this historical context enables us to assess the current state of development with a view to the future.

DESIGN OF THE CONFERENCE

Setting the stage for the conference program, we took a look at the current state of higher education unionization. In recognition of NCSCBHEP's Twentieth Annual Conference, Albert Shanker, President of the American Federation of Teachers, spoke on the experiences of academic unions during their first two full decades of bargaining, and commented on their present challenges and future goals. Arthur Shostak, a sociologist from Drexel University presented dynamic new approaches to unionization emerging in the 1990's as reported in his book, Robust Unionism: Innovations in the Labor Movement. Edward Hollander of the Graduate School of Management at Rutgers University and former New Jersey Chancellor of Higher Education suggested a number of ways that colleges and universities have dealt with recent fiscal cutbacks, including an exploration of how collective bargaining may impede or assist this process. David Rabban of the University of Texas School of Law, compared unionization with professionalism concluding through his research that, in some cases, professional values can even be strengthened by the collective bargaining agreement. His presentation focuses on professional influence in organizational policy-making. James Begin of the Rugters University Institute of Management and Labor Relations identified insights which are particularly relevant to the higher education enterprise from the landmark publication, The Transformation of American Industrial Relations, by Harry Katz, Thomas Kochan, and Robert McKersie. Irwin Polishook, President of the Professional Staff Congress of The City University of New York, spoke of the strength of academic unions within a battered academy.

A second theme of the Conference was that of individual and collective rights in the academy. David Rosenbloom of the School of Public Affairs at The American University gave his views on the impact of the constitutionalization of higher education on individual rights and collective action within academe. He presented a number of Supreme Court decisions which, in recent years, have tended to uphold the rights of the individual in public higher education. Walter Metzger, a historian from Columbia University, discussed the limits on

academic freedom as defined by the profession itself and from an analysis of certain applicable legal decisions. Timothy Healy, of the New York Public Library, spoke of three cases in which he was personally involved dealing with academic freedom: for students, for faculty, and in connection with an outside speaker on campus. Barbara Lee of the Rutgers University Institute of Management and Labor Relations, discussed the role of the union in faculty peer review.

A third area of focus at the Conference was that of higher education collective bargaining "in the trenches." Problem areas including specific campus disputes, the struggle, from both union and management points of view, in instituting faculty bargaining relationships, and the burden of health care costs on institutions were presented. David Kuechle, of the Harvard University Graduate School of Education and Thomas Mannix, Associate Vice Chancellor for Employee Relations at the State University of New York were given the challenging task of discussing the topic of "When Collective Bargaining Fails" based on several case examples suggested by the National Center. While discussing these cases from academic and management points of view, both speakers questioned the assumption of "bargaining failure" implicit in the assignment in relation to the cases cited. David Newton, Vice Provost for Faculty and Staff Relations at Adelphi University, addressed the operations and constraints of higher education collective bargaining from the managerial point of view. Norman Swenson, President of the Cook County College Teachers Union spoke strongly of his belief that all American workers should have the right to organize, bargain and strike without fear of reprisals. However, he also felt that union and management representatives should try first to resolve their differences through cooperative, non-confrontational bargaining processes. Michael McGarvey, a medical doctor and Director of the Health Strategies Group for Alexander and Alexander spoke on the newly emerging managed care options currently being considered by many employers. This topic is of particular urgency due to the escalation of health care costs during the 1980's which has put a great strain on the higher education community.

Legal decisions often form the framework within which the academy must function. Therefore, as a fourth area of examination, we included a review of seminal legal cases, past and present. An historical overview of cases effecting higher education collective bargaining over the past twenty-five years was discussed by Ann Franke, Associate Secretary and Counsel, American Association of University Professors and Woodley Osborne, Hanna, Gaspar, Osborne and Birkel. Recent cases were presented by James Cowden, Strokoff and Cowden.

THE PROGRAM

Set forth below is the program of the Twentieth Annual Conference listing the topics and speakers. Some editorial liberty was taken with respect to format in order to ensure readability and consistency. If an author was unable to submit a paper, the name appears on the program, but the remarks have been omitted. Opinions expressed are those of the authors, not necessarily their organizations or NCSCBHEP.

MONDAY MORNING, APRIL 13, 1992

WELCOME & COLLECTIVE BARGAINING UPDATE
Joel M. Douglas, Director, NCSCBHEP
Professor, Public Administration
Baruch College, CUNY

PLENARY SESSION "A"
THE IMPACT OF COLLECTIVE BARGAINING IN HIGHER EDUCATION: A LONGITUDINAL ANALYSIS

Speakers: Ernst Benjamin
General Secretary, AAUP

Ted Hollander, Professor of Management
Rutgers University

Irwin Polishook, President
Professional Staff Congress, CUNY

David Rabban, Professor
School of Law, University of Texas

Presiding: Joel M. Douglas

CONCURRENT SESSION "A"
CHANGES IN THE UNITED STATES SYSTEM OF INDUSTRIAL RELATIONS: ITS IMPACT ON CBHE

Speakers: James P. Begin, Professor
Industrial Relations, Rutgers Univ.

Harry C. Katz, Professor
NYSSILR, Cornell University

Moderator: Christine Maitland, Coordinator
Higher Education Services, NEA

CONCURRENT SESSION "B"
WHEN COLLECTIVE BARGAINING FAILS: THE BOSTON UNIVERSITY, TEMPLE UNIVERSITY, UNIVERSITY OF BRIDGEPORT, AND YESHIVA UNIVERSITY CASES

Speakers: David Kuechle, Professor of Education
Harvard University

Thomas Mannix, Associate Vice Chancellor
Employee Relations, SUNY

Stephen Finner, Director of Collective
Bargaining, AAUP

Moderator: John McGarraghy, Provost
Baruch College, CUNY

MONDAY AFTERNOON, APRIL 13, 1992

CONCURRENT SESSION "C"
SEMINAL LEGAL DEVELOPMENTS

Speakers: Ann H. Franke, Esq., Associate Secretary and Counsel, AAUP

Woodley Osborne, Esq.
Hanna, Gaspar, Osborne & Birkel, Wash. DC

Moderator: Laura Blank, Esq.
Director of Labor Hearings, CUNY

CONCURRENT SESSION "D"
ACADEMIC FREEDOM: ARE THERE PERMISSIBLE PARAMETERS TO FREE SPEECH IN THE ACADEMY?

Speakers: Timothy Healy, President
New York Public Library

Walter Metzger, Professor of History
Columbia University

Thomas Shipka, Professor of Philosophy
Youngstown State Univ., OEA

Moderator: Joan Rome, Director of Personnel
Brooklyn College, CUNY

ACADEMIC UNIONS: A QUARTER CENTURY OF CHALLENGES AND ACHIEVEMENTS

Speaker: Albert Shanker, President
American Federation of Teachers

Presiding: Matthew Goldstein, President
Baruch College, CUNY

TECH SESSION: THE EMPLOYEE HEALTH CARE CRISIS

Speaker: Michael McGarvey, M.D.
Director, Health Strategies Group
Alexander & Alexander, Inc.

Moderator: Esther Liebert, Director of Personnel
Baruch College, CUNY

TUESDAY MORNING, APRIL 14, 1992

PLENARY SESSION "B"
FROM BENCH TO BARGAINING TABLE

Speakers: Barbara Lee, Assoc. Professor
Industrial Relations, Rutgers University

David Rosenbloom, Professor
Public Administration, American University

Moderator: Perry Robinson, Director
College & University Department, AFT

PLENARY SESSION "C"
CAMPUS BARGAINING AND THE LAW

Speaker: James Cowden, Esq.
Strokoff & Cowden, Harrisburg, PA

Moderator: Joan Gibbons, Esq.
NCSCBHEP, Baruch College, CUNY

PLENARY SESSION "D"
DISPUTE RESOLUTION IN CBHE

Speakers: Tim Bornstein, Arbitrator
Westport, MA

David Newton, Vice Provost
Faculty & Staff Rels., Adelphi Univ.

Norman Swenson, President
Cook County College Teachers Union

Moderator: Frederick S. Lane, Professor
Public Admin., Baruch College, CUNY

LUNCHEON
STATE OF THE UNIONS

Speaker: Arthur Shostak, Professor of Sociology
Drexel University

Presiding: Joel M. Douglas

SUMMATION AND ADJOURNMENT

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in

colleges and universities. Operating on the campus of Baruch College, The City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- An annual Spring Conference.
- Publication of the Proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.
- An annual Bibliography, Collective Bargaining in Higher Education and the Professions.
- The National Center Newsletter, issued four times a year providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.
- Monographs -- complete coverage of a major problem or area, sometimes of book length.
- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, important books and relevant research reports.

ACKNOWLEDGMENTS

We would like to acknowledge the Center's National and Faculty Advisory Committees for their support and cooperation in planning the Twentieth Annual Conference of the National Center. A special thank you should be extended to Joel M. Douglas, then director of the National Center, who was responsible for the entire conference and also to our consultant, Joan A. Gibbons.

Beth Hillman Johnson
Administrative Director

I. *THE STATE OF UNIONS IN HIGHER EDUCATION*

A. **Robust Unionism and Unions in Higher Education**

B. **Can Collective Bargaining Help Institutions During a Period of Constrained Resources?**

C. **Is Unionization Compatible with Professionalism?**

D. **Changes in the United States System of Industrial Relations: Its Impact of Collective Bargaining in Higher Education**

E. **Unions in a Battered Academy**

THE STATE OF UNIONS IN HIGHER EDUCATION

A. ROBUST UNIONISM AND UNIONS IN HIGHER EDUCATION

Arthur B. Shostak
Professor of Sociology
Drexel University

Over thirty years ago, when the nation's labor movement claimed its peak post-WWII membership (30 to 35 percent), insider Sol Barkin warned that a "certain lassitude" had begun to overtake the American unions, a "new quiescent state."[1] He traced its roots to many high-profile problems, such unrelenting employer opposition, state right-to-work laws, costly National Labor Relations Board (NLRB) policies and decisions, the far-reaching contraction of employment in unionized industries, and the lack of response to organizing campaigns by employees in rapidly-expanding service and professional categories. In closing, however, Barkin advised that labor's ability to change itself was paramount: "...a change in the tides depends primarily upon...new policies, goals, techniques, and structures, and the assembling of new personnel to resume a new pattern of growth...the basic remedies must be developed within the movement."[2]

Now, three decades later, evidence grows that a significant component of organized labor heard this sort of warning and has heeded this sort of advice, that certain activists and officers have never doubted Barkin's contention that "an institution that does not grow tends to stagnate and atrophy," grow in inventiveness as well as in numerical membership.[3]

Especially exciting about organized labor in the 1990's is the influential presence of more social inventions, more field trials of promising new approaches than at any time since the turbulent (and highly successful) 1930's. Vulnerable on many scores, prime among which is the fear of reprisals that chills organizing campaigns, the movement's creativity raises fresh hope that a turnaround may be underway in the 1990's.

BACKGROUND

As a teacher of courses in industrial sociology since 1961, and as a former student of economist Richard Lester, the foremost American critic of bureaucracy's threat to union dynamism, I have a longstanding interest in labor's mix of

organizational statics and dynamics.[4] In 1976 I became a two-week-a-year adjunct sociologist in the Antioch College Degree Program at the AFL-CIO's George Meany Center for Labor Studies in Silver Spring, Maryland. Grass-roots activists and well-known officers alike took my Meany Center courses over the past 15 years (two are now presidents of their unions), and I learned much of value about little-known union creativity from many of these highly committed individuals.

Persuaded early on that far too few unionists knew as much as they desired about labor's inventiveness, as much as was food for their morale and their own creativity, I set out to research, write, and publicize a story conspicuous by its absence from the mass media. From 1987 through 1990 I criss-crossed the country collecting answers from proud union members to my questions -- "What's new? What are you doing here that other unionists could profit from learning about? What adaptations or social inventions do you actually have in the field? Why? And with what results to date? How do you feel rewarded? Let down? How would you advise others to do it otherwise? Who helped? Who hindered? Why? And with what consequences? Above all, what have you learned to apply to your next venture?"

FINDINGS

Over 200 of the most interesting projects I studied are discussed in my 1991 research report, Robust Unionism: Innovations in the Labor Movement.[5] Each is treated as a source of programmatic lessons for unionists, and a concerted effort is therefore made to note limitations as well as strengths, drawbacks as well as advantages, and clues to doing it better next time.

While diverse and uneven, the 200-plus examples of robustness had several features in common: e.g.:

1. A charismatic visionary of sorts sparked the entire risk-taking venture; a lone individual, rather than a committee;

2. Expectations were modest at the outset, and a low profile was carefully maintained; caution, rather than bravado, was the guiding principle;

3. Potential opponents, critics, and enemies were initially silent, waiting patiently to interpret the fickle judgment of the rank-and-file;

4. Most rank-and-filers were either enthusiastic or skeptical; few were initially cynical or hostile, as almost all preferred some type of action-taking to wimp-like passivity;

5. Middle-aged, experienced types, rather than naive youngsters or jaded old-timers, provided strongest support for the innovation;

6. Area media coverage was almost non-existent;

7. Area local unions learned about the innovation largely by chance.

Especially impressive was the personal sacrifice made by the change agent, as such individuals commonly gave "body and soul" to launch, guide, defend, and maintain their creation.

Where negatives were concerned, several showed up over and over again, e.g.:

1. International union officers and staffers were seldom looked to as a resource or ally; local unionists preferred to go it alone;

2. Lessons were seldom applied from earlier relevant projects, as few were known to the change agents;

3. Estimates of minimum costs in time, energy, and dollars were far too low;

4. Estimates of ease of project administration were far too rosy;

5. Conflict of personalities among the unionists took a far greater toll on the project than possibly any other single vexation.

Especially dismaying was the overriding importance of local union politics: a robust project could be sabotaged by political opponents of its sponsor almost regardless of ensuing costs to a potential boon for organized labor.

ROBUST CASES

Three projects can serve to illustrate the variety, creativity, and potential of the 200-plus examples in Robust Unionism.

1. Job and Community Protection Program. Since the early 1980's the JCPP has linked the Northern California Pipe Trade Association with area environmentalists in an unprecedented alliance, one that intervenes in the land-use permit application of non-union builders. When the JCPP discovers any such person in violation of EPA regulations, it forces a halt until the violation is corrected and the offender agrees to "build union." In this way a compromise settlement is secured that addresses both the complaints of area environmentalists and labor's economic concerns.

There have always been isolated instances of cooperation between labor and environmentalists (and organized labor was the nation's first environment clean-up proponent)! But the JCPP goes farther in solidifying the relationship and making a working alliance systematic and cumulative. Both parties benefit as more and more unionists work on construction projects with environmental integrity.

2. Reorganizing the Air Traffic Controllers. When President Ronald Reagan fired 11,345 PATCO strikers in 1981 it seemed highly unlikely that unionism would ever again be part of the controller scene. Yet in 1987 the workforce that took over the jobs of PATCO strikers shocked the business world and the White House alike by voting two-to-one in favor of creating their own successor to PATCO, a union they named the National Air Traffic Controllers Association (NATCA).

PATCO replacements had come from three sources: Some 1,000 had broken ranks and crossed the picket line. Several thousand had thumbed their nose at the strikers and rushed to grab the jobs. About 1,000 more were former military controllers -- a mix of types no union organizer would regard as good prospects.

NATCA organizers, however, had mixed several innovations in a most creative way, e.g.:

1. They emphasized listening to complaints, rather than pitching unionism as a "must buy!" product;

2. They made the complaints they heard NATCA's priorities, rather than impose a list of priorities on potential members;

3. They buttressed their full-time staff of five with a volunteer force of over 100 controllers;

4. They assured recruits that NATCA, unlike PATCO, would do all in its power to create and maintain a nonadversarial and collegial approach to labor-management relations.

Little wonder, accordingly, that the organizing campaign victory was hailed as the most stunning second act in modern labor history! Cited as proof labor could organize high-tech, high-brow professional employees, the NATCA victory was represented at the 1987 AFL-CIO biennial convention as proof that "we're on the road again to a resurgent labor movement."[6]

3. The Union Club. While various unions have long sought to maintain ties with their retirees, this has been on a union-by-union basis, with far too little money or staff effort allocated to the project.

A very different model was created in 1979 by three retired officers of the Steelworkers Union. Their Arizona-based Union Club now has nearly 7,000 members organized in 14 chapters across the state. Members come from 87 different unions and a wide range of crafts and industries.

What makes this project outstanding is its exuberance, its disinclination to get in a rut and settle for "business as usual." Instead, the retirees are extending club activities in every possible direction, e.g.:

1. Their speakers' program carries labor's story into K-12 school classrooms;

2. They help give out leaflets in organizing drives;

3. They offer advice to locals eager to negotiate optimum contract language for workers about to retire;

4. They raise funds for activists in need, such as Cesar Chavez:

5. They influence area and state politics on behalf of all retirees (union and non-union alike);

6. They provide home and hospital visits for members in ill-health.

Overall, the club serves as an educator, a consciousness-raiser, a clarifier of issues, and a forum for sharing personal views. it helps many retirees reaffirm lifelong ties to labor, even as it has elevated union affiliation -- once concealed by retirees in Arizona -- to a badge of honor.

ROLE OF HIGHER EDUCATION LOCALS

If robustness is to spread and thrive in labor affairs, it can use a boost from the nation's campus-based locals. For openers, they can help influential academics opt to "raise consciousness" on and off campus about this proud aspect of a revitalized union movement. They can offer ideas and personnel to buttress innovations undertaken by locals in the area (especially helpful would be outreach to locals seldom contacted, such as those in the building trades). And they can model the innovation process themselves by demonstrating the power of creative projects to organize the unorganized and the organized alike, robust locals in higher education can help show the way to an evermore dynamic unionism.

SUMMARY

Convinced that employed Americans need to band together "for their own self-interest and in the interests of American society," labor intellectual Solomon Barkin urged the labor movement in 1961 to undertake a "drastic overhaul of spirit and structure," a "transformation as radical as that of the Thirties..." Now, in the 1990's, it can be said that an overhaul akin to Barkin's vision is finally underway, though whether "too little, too late" remains to be determined.

Only this much is certain, should labor's 30-year old slide persist it will be despite the most creative and empowering effort at self-renewal a union partisan could wish. Media misrepresentation and rank-and-file cynicism to the contrary, numerous locals, internationals, departments of the AFL-CIO, and the labor federation itself, are bustling with

bright social inventions. The mood favors unprecedented risk-taking, followed by unsparing assessment, leading next to the re-commitment of (scared and valued) personnel and resources to improved second and third versions of field tested innovations. The mood, in sum, favors just the sort of self-renewal effort without which the movement, and the entire American workforce, cannot hope for a future that honors us all.

ENDNOTES

1. Barkin, Solomon. The Decline of the Labor Movement and What Can be Done About It. Santa Barbara, CA: Center for the Study of Democratic Institutions; The Fund for the Republic, Inc., 1961, 5.

2. Ibid, 64.

3. Ibid., 6.

4. Invaluable here is an overlooked seminal work, As Unions Mature: an Analysis of American Unionism. Princeton, NJ: Princeton University Press, 1958.

5. Available in paperback from the ILR Press, Cornell University, Ithaca, NY 14853-3901 (607) 255-2264, $18.95.

6. Lane Kirkland, AFL-CIO president, as quoted in David Lyons, "Kirkland Issues Call to Bolster Union Ranks," Philadelphia Inquirer, October 27, 1987, 4-A.

7. Barkin, op. cit., 74.

THE STATE OF UNIONS IN HIGHER EDUCATION

B. CAN COLLECTIVE BARGAINING HELP INSTITUTIONS DURING A PERIOD OF CONSTRAINED RESOURCES?

T. Edward Hollander, Professor
Graduate School of Management
Rutgers University

HIGHER EDUCATION VIEWED AS A DISCRETIONARY APPROPRIATION

A legislator recently commented that his state's higher education system served the state's need for a "rainy day fund." "When times are good," he commented, "we fund our higher education budget generously; when times are bad we dip into our informal 'reserve fund' to balance the state's budget."

States across the country have rediscovered that funding for higher education, unlike elementary and secondary, corrections, and other state mandated services, is a discretionary appropriation which state leaders can expand or reduce, depending on the state's fiscal circumstances. They have discovered too, that the short-term consequences of higher education budget reductions cannot be identified with sufficient precision to create either a political or educational crisis. One key member of a governor's staff suggested after two successive cuts in her state's higher education budget that she was still trimming fat. Her conclusion reflected the ease with which colleges and universities were able to absorb the reductions without a single layoff of any of the 10,000 full-time faculty members or the rejection of a single student. She asserted she would continue to recommend reductions until some adverse consequences were noted.

In state after state, the fiscal year 1991 budget base was reduced in mid-year in response to the shortfall in state revenues caused by the recession. A survey, conducted under the auspices of the State Higher Education Executive Officers' Association found that 90% of the states in the East suffered mid-year reductions averaging 3.1% in the fiscal year ended 1991.

Higher education fared even worse in the current fiscal year. While college and university boards in the "East" requested a 9.2% increase for their institutions for 1992, the states responded with even sharper reductions, lowering base budgets by 3.5%. Mid-year budget reductions were made in 22 states in the current fiscal year.

OUTLOOK AHEAD IS BLEAK

Four factors suggest a continuing bleak outlook, though I do believe that we tend to discount the future too heavily when times are bad and to be overly optimistic when times look good.

The economy has been relatively stagnant for several years, with opinion divided between optimists who at best project a slow growth and pessimists who believe we are at the edge of an economic precipice. But even the most optimistic among the members of that "dismal profession" whose life work is to avoid reaching a conclusion, foresee growth so slow that state revenues in pivotal eastern states will barely grow in relation to escalating mandated costs.

For this and other reasons, the states' ability to finance expanded budgets is tightly circumscribed by "taxpayer revolts" and higher priorities states now accord to elementary and secondary education, corrections, and health services. The attitude toward higher education in many states is downright hostile, reflecting a sense in many state houses that colleges and universities have neglected teaching in favor of research and have not responded adequately to statewide priorities for minority access, school improvement and other issues related to the perceived decline in America's competitive position.

The Federal outlook for higher education is somewhat better as Congress wrestles with the Reauthorization Act. Student aid and loan programs appear to have survived the "default" problem. Congress has traditionally supported higher education programs and is likely to continue to do so. The administration is another matter. While "presidential election politics" has temporarily sidetracked interest in the expanding federal deficit, it is clear that the deficit is continuing to increase. It is likely to expand faster in future years with "no new taxes" proposed by the Republicans and increasing health care costs a certainty under a Democratic administration. A future administration will have to deal with unbalanced budgets through the end of this century while many federal programs continue to spin out of control. Reliance on a new expanded federal role for financing higher education would be foolhardy. The odds for a continuing effort at the current level, however are good.

Rising tuition revenues, especially in the public sector, have been used to offset state budget reductions in many states, especially in the "East." However, price resistance is growing and will limit tuition increases as a compensating source of revenues in both the public and private sectors. Several states have restricted the ability of public

institutions to raise tuition. Public institutions cannot count on continuing a rate of increase in tuition much beyond changes in the price level.

In summary, the poor economy, changing state priorities, federal budgetary problems and the resistance to high levels of tuition will seriously constrain college budgets for the near-term and very likely through the remainder of the century.

CAN COLLEGES HELP THEMSELVES?

Increasingly, the question is being raised on campuses and in the state houses, "Can colleges help themselves?" "Can they become more effective?" "Can they become more efficient?"

One would think that the sharp budget reductions imposed on colleges and universities would lead directly to a fundamental reappraisal about priorities, administrative costs and the potential for productivity gains. Nothing focuses the mind so effectively as the fear of institutional death or radical surgery.

The first responses to budget reductions were predictable. Most colleges that experienced across-the-board state reductions followed the state's example. They allocated budget reductions across the board, after first passing as much of the burden onto the students as they reasonably could. The first victims of budget reductions were the long-suffering maintenance departments whose staffs are both powerless and invisible. Extending the backlog of deferred maintenance is not only traditional, but almost compelling. When it became necessary to reduce employment, the layoffs were distributed among the least powerful groups on campus, the mid-level administrative staffs, the secretarial staffs and the adjunct faculty.

The initial blows fell upon those expenditures most easily reduced from a political perspective. Issues of productivity, priority, improved efficiency, institutional mission, and the possibility of continuing budget reductions were barely discussed. In all fairness to our campuses, the first reductions were unexpected and sudden. There was no time for planning.

The second round of reductions has stimulated research, recruitment of consultants and interest in long-term solutions. More and more members of the academic community have come to recognize that there may have been a fundamental shift in the funding prospects for higher education, requiring institutions to reframe the problem in terms of fundamental questions of structure and purpose.

The first major effort in this area has occurred in Oregon, where the state system faces reductions of 30% over the next five years. With strong and effective leadership, the university system has responded to impending disaster with two initiatives. First, the system is reevaluating its

administrative structure and systems in an effort to improve services, prune needless layers of structure, and reduce the administrative work force. Their goal is to reduce costs, yet improve service by streamlining and decentralizing. Their second response is more controversial. They determined that they would not reduce academic services across-the-board or in relationship to the proportion of non-tenured to tenured faculty. Instead they determined to strengthen and enhance their highest priority and strongest programs and eliminate the rest to the extent necessary to meet their expected budgetary levels. Their reasoning is that the system cannot survive a general weakening but it can lop off what is not essential without destroying the morale or effectiveness of the remainder. Whether they can achieve the high level of savings required at an acceptable level of conflict remains to be demonstrated.

The remainder of this decade is not likely to be business as usual. Dealing with fiscal constraint long-term requires a strategy that permits continuing educational improvements while controlling expenditures. The simultaneous accomplishment of both is only possible through increases in productivity and improvements in management efficiency.

AMPLE ROOM FOR IMPROVEMENT

Colleges and universities have ample room for improvement. Recent studies have documented the rapid increase in academic and administrative expenditures for higher education, 2.5%-3% beyond inflation. Administrative costs rose a whopping 60% during the past decade. Faculty salaries rose in real terms and teaching loads continued to decrease. These changes occurred during a period of relatively stable enrollments. In part, they were a response to generous public financing. In part, they compensated for the perceived underfunding during the 1970's.

SAVING MONEY AND STRENGTHENING RESOURCES

The following are four major possibilities which I suggest for strengthening educational programs during a period of limited resources.

A. Build the Institution's Future Around Areas of Strength: Establish, Achieve Agreement on and Communicate Clear-Cut Goals for the Institution

This requires strong effective institutional leadership that can set a vision for the institution, set realistic goals, set priorities in relation to the goals and plan strategically for their realization. Once these agreements are reached, the institution needs to prune away academic and administrative programs that are inconsistent with the long-term goals of the institution.

B. Streamline the Administration

Reexamine the basic organizational structure of the institution in relation to its goals, eliminating low priority

administrative functions, reducing levels of reporting, treating faculty and students as constituents to be served and not constituents to be controlled, and establishing an on-going mechanism for monitoring administrative performance. Establish and meet a standard for state-of-the-art systems for admission, registration, payment of fees and other student services.

C. Force Decision-Making and Budgetary Responsibilities Downward into the Departments

Strengthen departmental chairpersons' ability to manage by providing them with budgetary flexibility, permitting departments to reallocate savings for continuing improvements. Use the budget both as a spending constraint and to provide teaching and research options for faculty members.

D. Reexamine Fundamental Educational Assumptions

Other commentators have suggested that one area of waste on campus is in the entrepreneurial role of the faculty member, who, alone among employees in our society, sets his or her own workload, priorities and time commitments. I believe the freedom afforded faculty members to allocate their own time is essential to the educational process. Yet we need to reexamine whether we use faculty time effectively and efficiently. I am not just talking about teaching load and class size, but also about the waste of faculty time in administrative tasks and at badly planned meetings, the length of the calendar, the continuing almost exclusive reliance on the lecture method, the maintenance of highly specialized, low enrollment courses in the curricula, and the continuing expansion into new programs without eliminating existing low enrollment programs.

Most fundamentally of all, we need to strengthen the management function in higher education. Institutional management has been a low priority in higher education. Some have even labeled the term an "oxymoron." Indeed it may be. College leadership in the public sector has been traditionally weak. It is not that the weak aspire to leadership, though some have suggested that the selection process itself serves to eliminate strong candidates. A more rational, a certainly more acceptable explanation, derives from the nature of the institution which emphasizes entrepreneurial qualities, participative decision-making, strong protective security arrangements for faculty members, and the capacity of faculty for endless debate of even the most trivial questions. Academic administration relies heavily upon collegiality for its decision-making processes. Departmental chairpersons, the first line of authority, are essentially "firsts" among equals, lacking both the tools and the incentives to manage.

In the public sector, the state, itself, weakens institutional management. Northeastern states are notorious for their intrusiveness into the management process, relegating many institutional heads to a "mediative role" between the state agencies and the institution. The state provides no incentives for improvement. State funding

criteria are indifferent to management effectiveness and efficiency. State incentives do not encourage strong management positions. In fact, the state plays a counterproductive role encouraging institutional dependence, "buck passing," and issues to "float up" from the campuses to the highest levels of state government where the decision is often made by a low-level budget examiner. No wonder, then, that one researcher found that the most successful college president, that is, the one who survives the longest, plays a reactive rather than a leadership role.

The times are likely to require strong not weak leadership and aggressive presidents who are willing to make difficult choices among competing priorities and programs. Strong leadership is required to redefine workload, shift the balance between research and teaching, control administrative costs, return the college to a service function with the principal constituencies defined as both students and faculty members.

Not everyone will agree with the assumption that the future outlook is that bleak or the conclusion that strong and effective management is imperative for dealing with fiscal constraint. I leave the suggestion of alternatives to those with a more optimistic bent.

COLLECTIVE BARGAINING AND INSTITUTIONAL LEADERSHIP

Will collective bargaining strengthen or detract from the ability of institutions to confront a more demanding public less generous with its resources?

Strong institutional leadership is consistent with collective bargaining. A strong collective bargaining agent requires strong and effective institutional management. The institutional response to effective union representation is to build countervailing power. Weak leadership is rapidly unmasked in the collective bargaining process, and an accommodating president is not likely to be tolerated by an institutional governing board. The nature of the process is centralizing, causing a transfer of power on the campus from the departmental level upwards into the central administration. Collective bargaining brings with it disadvantages of centralization and advantages of strong central management leadership.

COLLECTIVE BARGAINING AND INSTITUTIONAL RETRENCHMENT

Collective bargaining can be useful in providing for an orderly process of retrenchment should that prove necessary. A well-defined and acceptable retrenchment process validates presidential action when it is needed and provides a vehicle for faculty participation in a process largely dependent upon faculty cooperation. Whether the process is defined in the university's policies or in its collective bargaining agreement, its development is likely to be a shared effort of the bargaining agent and the institution's management.

Strong institutional leadership can be allied with strong union leadership if both parties share common interests for personal and institutional survival against a common external enemy. The alliance, at least in theory, can be continued to confront difficult internal choices. While one would not expect the faculty representatives to participate actively in making budget cuts, their acceptance of management's responsibility to do its job honestly and well will be helpful in dealing with constraint. I would conclude, therefore, that collective bargaining is both consistent with and supportive of strong institutional management, the kind needed in the remaining decade of this century.

COLLECTIVE BARGAINING AND CHANGES IN EDUCATIONAL MISSION

Collective bargaining can limit significantly the options available to an institution when budgets are cut. If the union's primary responsibility is to protect the interests of its active membership, it may not be able to fulfill that primary responsibility while participating or accepting a program designed to improve overall productivity and institutional efficiency.

For one thing, the faculty union may be far more powerful than representatives of other constituencies on campus. Full-time faculty jobs may be preserved while adjunct, secretarial, administrative and maintenance jobs are abolished. If that approach is educationally sound, well and good. If not, an unbalanced retrenchment may be inconsistent with the long-term interests of the faculty, students and the institution. The elimination of programs and services inconsistent with the mission of the institution or which are low in priority compared with other programs may conflict with the needs of the faculty represented in collective bargaining. Permitting deferral of maintenance or of capital projects may make an institution less competitive, but these management priorities are not likely to be those of the institution, when times get tough.

Can collective bargaining play a constructive role in achieving gains in productivity and effectiveness in the academic function? If one accepts the premise of the Oregon model that institutions should contract around areas of their strength, will collective bargaining facilitate elimination of low priority programs that result in layoffs of tenured faculty members while protecting non-tenured faculty members in high priority programs? Can unions support workload increases, if they are necessary? Can they accept incentive systems that seek to achieve efficiencies? Can they support such reforms as better accountability, more effective expenditure control, and increased assessment, reforms that are increasingly demanded of the academic community?

Whether they do so or not is important to the comfort level of the administration, but not necessarily to the implementation of these programs. Not all institutional issues are susceptible to collective bargaining. The responsibility for effective management falls on the board and

its appointed executive officers. They need to do their job, even when it is painful and unpopular. The collective bargaining process cannot bear the weight of responsibility for the management of an institution. College presidents are not members of the bargaining units. They should not expect bargaining units to do their work. Presidents who want only to be loved need to find some other line of work. Their role on the college campus requires that they earn their keep though that may require adversarial relationships with those persons chosen to represent faculty interests. Maintaining a balance among institutional interests and in the competition for resources in the future may require less participative democracy and more effective decision-making among institutional leaders.

Finally, it should be said that faculty representatives have often taken positions in support of institutional interests even when such positions were not popular on campus. They often have pressed for better management and educational reform before it was popular to do so. They have insisted on orderly processes for retrenchment before the topic was a priority for governing boards. And they often have cooperated in painful and difficult campus decisions when institutional survival is at stake.

The role of collective bargaining when resources are scarce will be defined differently depending upon the history of collective bargaining, the nature of presidential leadership and the degree of pain experienced on the campus. It also depends upon whom the union represents. If the union represents a cross-section of the faculty who give it active support, the union's interests will tend to coincide with the broadest faculty interest. If the union activists are drawn from a more limited group with their own particular agenda, there is likely to be greater divergence between the faculty interests expressed through the union and the interests of the broader constituency. Institutions may do well to encourage the broadest possible membership in unions on campuses where collective bargaining is an established institution.

CONCLUSIONS

The future outlook for financing higher education is bleak, especially in the eastern states that are in transition to a relatively weaker economy. Institutions that can manage effectively during the next decade will take advantage of the times to rethink their budgets and programs. They will emerge stronger at the expense of other institutions.

Collective bargaining can be an ally or obstacle to the changes needed during the next decade. College administrators should take full advantage of the opportunities for effective working relationships with the union leadership. Such relationships will facilitate maximum faculty support for whatever course of action the times may require. Good working relationships during painful times will require a high degree of statesmanship on the part of all parties.

Administrators need to accept greater responsibility for leadership and setting the institution's future course in

relation to public needs for higher education and the needs of all of the constituencies the institution serves. Circumstances will often require that the college leadership understand but reject the position of the bargaining agent when its interests are at variance with the policies of the governing board. The boundaries that separate management and labor are likely to emerge more sharply defined at the end of this decade, and that may well be a step in the right direction. Collective bargaining cannot bear all of the burdens of institutional management.

THE STATE OF UNIONS IN HIGHER EDUCATION

C. IS UNIONIZATION COMPATIBLE WITH PROFESSIONALISM?

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Debate over the compatibility of unionization with professionalism has accompanied the dramatic growth of collective bargaining by professional employees during the past three decades. Many people, including many professional employees themselves, believe that the selection of a union entails the rejection of key professional values, such as collegial participation in organizational decision-making, professional independence from hierarchical control, and expectations of performance and rewards based on individual merit.

Many others, by contrast, claim that collective bargaining is often the most effective method of achieving and maintaining these same professional values, even under a system of labor law that imposes barriers to bargaining over professional issues and that may not cover professional employees who play a significant role in institutional governance. Traditional unions, whose leaders once invoked collective bargaining as an alternative to the allegedly bankrupt ideology of professionalism, now emphasize that collective bargaining can and should address distinctively professional concerns. Correspondingly, many professional associations have shifted from the view that collective bargaining is unprofessional to support for unions as a means to professional goals.

In an effort to offer a preliminary assessment of the crucial debate about the relationship between collective bargaining and professional values, I examined over one hundred collective bargaining agreements covering teachers, nurses, professors, social workers, engineers, librarians, journalists, curators, performing artists, doctors, and lawyers. Collective bargaining agreements covering professional employees are in many respects quite similar to their counterparts in the industrial sector. The overwhelming majority of them include provisions on wages, fringe benefits, the grievance-arbitration procedure, and the range of other subjects commonly found in labor contracts. Such provisions often constitute the bulk of agreements in professional employment.

Yet, these agreements, with varying degrees of specificity, frequently address distinctively professional issues as well. I have grouped these issues into six general categories: (1) establishing professional standards, (2) providing mechanisms for professional participation in organizational policy-making, (3) regulating professional work, (4) providing training and professional development, (5) committing organizational resources to professional goals, and (6) elaborating the criteria for personnel decisions and the role of professionals in making them.

Collective bargaining agreements, as the people who have negotiated and worked under them point out, reflect only imperfectly the actual experience of the professionals they cover. Contractual language does not reveal the status of professional values before unionization. The same provision that in one work setting represents an advance in protection for professional values may in another setting weaken what earlier had been even greater organizational commitments to professionalism. Organizations may respect professional values even though these values are not addressed in contracts. In fact, many organizations and unions agree that professional values are best protected by keeping them outside the collective bargaining relationship. On the other hand, contractual provisions that explicitly protect professional values may be ignored or evaded in practice, and may not govern many crucial aspects of relationships at work. Yet, the same people who caution against equating these provisions with workplace realities also acknowledge that they offer important insights into how unionization has affected professionalism.

This paper will focus on one of the six issues outlined above: professional influence in organizational policy-making. Councils of professionals, joint committees of professionals and administrators, and direct union involvement are the most frequent mechanisms for professional participation. Agreements typically emphasize that these forms of professional influence are advisory only, with final authority resting in management. Extensive contractual protection exists for faculty participation in academic governance. Professionals in other fields rarely obtain this degree of influence, but some of their contracts require management to give their recommendations serious consideration and to provide reasons in writing and an opportunity for reconsideration when those recommendations are rejected.

Councils of professionals are particularly prevalent in higher education, where they often antedated union organization. Many labor contracts between faculty unions and universities protect the established system of faculty governance. They frequently identify the faculty senate or similar faculty bodies as the conduit of faculty advice to the administration on academic issues not otherwise covered by specific contractual provisions. These issues include research, admission and retention of students, curriculum, methods of instruction, grading, program development and review, and utilization of financial resources. Faculty senates and other collegial bodies may have rights under the labor contract to receive financial data and other relevant information from the administration.

Unions representing professionals in other fields have negotiated for regular meetings between a council of professionals and management to discuss broad issues of policy. A contract between a medical center and a union of nurses creates a council of nursing practitioners, composed of all nurses in the bargaining unit, to make recommendations on nursing practice and nursing care consistent with professional standards. Committees of nurses selected by the council are given specific responsibility to assess staffing patterns and ratios, examine the adequacy of resources and support services, and evaluate the relationships between nurses and other disciplines and departments of the medical center.

Unions representing attorneys employed by legal services programs have negotiated for periodic meetings with management, often called forums, at which any lawyer on the staff can address "issues of project-wide significance" in order to "facilitate the decisionmaking of the Executive Director." Some provisions give examples of the kind of issues appropriate for discussions at the forums, such as opening, relocating, or closing offices, staffing patterns, and proposed program budgets. One collective bargaining agreement requires notification to the forum of any significant recommendation the Executive Director anticipates making to the Board of Directors and an opportunity for the forum, after discussions with the Executive Director, to present its own views to the Board.

Members of symphony orchestras, through the "musical advisory committee" or "orchestra committee" created by their union contracts, can elect representatives to advise management of various musical matters, including scheduling, repertoire, and the choice of guest and permanent conductors. Collective bargaining agreements provide public school teachers rights to advise the school administration on instructional, programmatic, and budgetary matters through bodies designated as faculty advisory committees or instructional councils.

Professional participation in the development of organizational policy often occurs through joint committees of professionals and administrators rather than through councils composed entirely of professionals. Unions of physicians have negotiated for joint committees on matters such as admission of patients, patient care facilities, emergency services, use of drugs, infection control, quality assurance, and medical education. Joint committees of journalists and editors have addressed editorial policies, beat coverage, and the extent of investigative reporting. Contracts covering engineers mandate joint committees to develop recommendations for training programs, career enhancement, and pilot projects involving "innovative approaches in the workplace." In public education, curricular review and textbook selection are performed by joint committees of teachers and administrators mandated by collective bargaining agreements. Joint committees, with jurisdictions similar to the councils of professionals established by other collective bargaining agreements, frequently exist in nursing and in legal services programs.

Methods for selecting professionals to participate on these councils and joint committees vary greatly. They include majority vote of all professionals, appointment by the administration, designation by the union, and combinations of all three techniques. In public education, parents and other members of the community sometimes serve with teachers and administrators on joint committees.

A few unions have negotiated exclusively for themselves the function in influencing organizational policy that more typically is delegated to councils of professionals and joint committees. According to the labor contract covering the professional staff of a museum, the director must meet regularly with designated representatives of the union and inform them of all relevant policy matters under consideration by the board of trustees. Examples include program and staff reductions, museum hours, and admission charges. The union representatives have a right to present to the trustees the union position on such policies. The contract also allows the chair of the union to attend all meetings of the museum's department heads. A contract covering the Minnesota community college system gave the faculty union the right to select only union members to serve on "meet and confer" committees that functioned as the official expression of faculty views to the administration on matters of educational policy. Hospitals have agreed to consult with unions of interns and residents over inspections by accreditation bodies, and social services agencies have agreed to consult with unions of social workers over efficiency studies.

Occasionally, labor contracts provide that representatives from the professional bargaining unit serve as members of the organization's key committees and boards. For example, collective bargaining agreements stipulate that at least one musician must be a member of an orchestra's finance, planning, and search committees and that two representatives of the interns and residents employed by a hospital must serve on its medical board. Union representation on governing boards need not preclude, and often coexist with, councils of professionals and advisory councils. In order to promote innovative professional participation in decision-making, unions may agree to consider waiving provisions of collective bargaining agreements.

As these examples illustrate, there is significant variation in the degree of professional influence over organizational policy provided by contractual mechanisms. Some professionals, especially university professors, have much more decision-making power that others. The methods used to select representatives on policy-making bodies, moreover, affect professional values. The potential contribution of professional judgment and expertise to the formulation of policy provides the basic professional rationale for participation in organizational decision-making. Selection by vote of the entire professional staff, rather than designation by officials of the union or the employer, seems most likely to produce representatives who meet the higher professional standards. Union control over representation might promote selection based on union membership and activity, just as management control over representation might

promote selection based on pliability to bureaucratic directives. The professionals best qualified to serve on policy-making bodies and most committed to professional standards may often be those who are most independent from both the management and the union. Collective bargaining agreements that allow unions or employers to designate employee representatives, though obviously fostering professional participation in organizational decision-making more than settings in which little or no professional involvement exists, contribute less to professionalism than contractual provisions that place the selection of representatives with the professional employees themselves.

My analysis of collective bargaining agreements prompt me to suggest a number of areas for further inquiry. Many contractual provisions, for example, cover professional issues that are not mandatory subjects of bargaining under federal or state labor laws, such as participation in organizational decision-making. This evidence indicates that various nonlegal factors may be more important in the negotiating process than legal rules. Perhaps managers who view the election of a union as an abandonment of professionalism, and union leaders who perceive participation in peer review and the formulation of policy as coopting professional employees without giving them real power, are more likely than their less skeptical counterparts to resist contractual provisions that provide unionized professionals a major role in organizational decision-making.

Further research could usefully compare organizational recognition of professional values before and after unionization, elaborate how the parties' attitudes toward unionization affect the substance of the agreements they reach, examine whether and why these attitudes and agreements change over time, and investigate the degree of congruence between contractual language and the actual experience of employed professionals. The type, size, and quality of the employing organization, differences among unions, and the professions of the unionized employees might correlate with adherence to professional values.

I conclude by reiterating that collective bargaining has had a mixed impact on professional values. Contractual support for professions, and many provisions straddle an uncertain and debatable border between professional interest and self-interest. Yet, the existence of substantial, unambiguous support for professional values in many agreements suggests, at a minimum, that unionization and professionalism are not inherently incompatible, and directs attention to identifying factors that may account for the widespread variation in the contractual treatment of professional concerns.

THE STATE OF UNIONS IN HIGHER EDUCATION

D. CHANGES IN THE UNITED STATES SYSTEM OF INDUSTRIAL RELATIONS: ITS IMPACT ON COLLECTIVE BARGAINING IN HIGHER EDUCATION

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The landmark book, The Transformation of American Industrial Relations, by Harry Katz, Tom Kochan, and Bob McKersie (hereinafter KKM) effectively describes and explains the major transformation now underway in private sector labor-management relationships in the United States. For the purpose of identifying the insights of that research that are relevant for the discussion of the higher education enterprise below, the major conclusions of the book concerning the private sector labor-management transformation are as follows: (1) a decline of union membership, (2) the decentralization of collective bargaining, (3) the shift to a less adversarial bargaining, more continuous bargaining process, (4) the decline of job control unionism where seniority played an important role in allocating employees among numerous job classifications, and (5) the growth of enlightened human resource policies, including (a) the growth of participation by employees and unions in job-level, administrative, and strategic policy, (b) the growth of employment security, (c) the redesign of jobs to increase responsibilities, (d) increased training, (e) the greater use of flexible compensation, and (f) a reduction in status differentials (payment of salaries to all, no special uniform, parking, or cafeteria privileges for managers). In addition to the employer substitution effects potentially created by these enlightened policies, recent decades have seen a growing government substitution for unions as public employment policy has expanded to protect the rights of individual employees (for example, equal employment opportunity, health and safety, pensions, the decline of employment-at-will).

The drive towards more flexible organizations in response to global competition was one of the major forces producing these changes identified by the book. The discussion of several possible scenarios by KKM in terms of the survival of the labor movement as a potent force in our society do not lead one to be optimistic that a turnaround in organized labor in the private sector will occur in the near future. It should be noted, however, that labor-management relations in

the public sector have generally undergone a less severe transformation. For example, union membership in the less blue-collar oriented public sector has declined much less severely: from a high of around forty percent in the mid-1970's. By the late 1980's membership had declined a few percentage points (Burton and Thomason). The ongoing recession that has hit the more highly unionized states the most has undoubtedly impacted union penetration in the public sector. But the unionization rates are still approximately twice those of the private sector. The greater insulation of public services from foreign imports likely underpins this result, although the decline of private sector unionism has undoubtedly contributed to the stagnation of public sector union growth. The development of enlightened human resource policies is not as far advanced in the public labor relations sector, although it should be recognized that civil service regulations and the broader job designs of most public service functions already provide some of these policies.

The task of this paper is to assess and explain the extent to which higher education bargaining relationships are also undergoing a transformation. Unlike the diligent research that underlies the KKM volume, however, many of the conclusions in this paper are drawn from the limited research presented in recent literature on higher education labor and human resource issues, and the personal observations of the author. The research literature on the nature of staff bargaining and human resource issues is particularly limited.

The result of this analysis of first faculty bargaining and then staff bargaining will be that there has been no similar transformation of labor-management relations in the higher education labor sector beyond the substantial increase in unionism that began in the late 1960's and early 1970's. This is the case for both the faculty and staff sectors, although the reasons for the absence of change in each sector vary.

FACULTY LABOR-MANAGEMENT RELATIONS

A. Membership

Data compiled by the National Center on faculty union membership indicate that, after reaching a peak membership of around thirty percent of the professoriate by the early 1980's, membership has remained essentially unchanged, with annual election activity affecting a handful of institutions (Newsletter, National Center, Vol. 18, No. 1, 1990). The absence of growth can be attributed to a number of factors, but certainly the U.S. Supreme Court's Yeshiva decision which determined that faculty in private institutions with managerial authority were excluded from National Labor Relations Act protections, has been one of the most important. Public sector labor statutes excluded managerial and supervisory employees from coverage to a lesser degree, so similar efforts to exclude public sector faculty from statutory coverage have not been widespread (a National Center Newsletter, Vol. 18, No. 2, 1990, indicated that at the time four public institutions had attempted to apply the Yeshiva

doctrine [Wichita State, University of Alaska, Southern Oregon State College and the University of Pittsburgh -- only the latter had been initially successful, but was later reversed; a subsequent union election was lost by the union]). Thus, the sole change in faculty union membership in recent years has been the loss of private institution membership, offset in part by the slow growth of unionism in larger, public institutions.

B. Bargaining Structure

The faculty bargaining structure for higher education is connected to other institutions of similar types, to other state or local units, or other units within the institution. Where bargaining was initially centralized in large state systems (SUNY and CUNY), it has remained centralized. The more common institution-by-institution bargaining pattern has continued. Continuous bargaining also does not appear to be on the increase, although the existence of dual governance bodies on many campuses serves that purpose to some degree. As measured by strike activity, faculty bargaining has never been particularly adversarial [somewhat over 160 strikes in 25 years for around 450 bargaining units] (Newsletter, National Center, Vol. 18, No. 1, 1990). There has been some move, particularly in community colleges (for example, in Michigan), towards a more mutual gains approach to negotiations. Some four-year institutions have tried it or are thinking of trying it.

C. Governance

Workplace issues have also not undergone much transformation. Faculty bargaining has brought some improvement to faculty governance processes in some institutions, creating faculty senates or councils and other governance mechanisms where they did not previously operate (for example, Rider College and Fairleigh Dickinson University before it applied the Yeshiva doctrine). However, the topic of governance has been found to be a permissive subject of negotiation in most states, and illegal in some, for example, New Jersey. Change has not been endemic in respect to other human resource issues either. Burke (1987), after replicating the thirty-year-old Caplow and McGee (1958) study of faculty human resource policies, concluded that the policies and procedures used to manage faculty resources had changed very little over the thirty-year period.

Two basic reasons account for the fact that faculty labor-management relations, after a growth spurt in the 1970's, have not undergone the type of transformation in the private sector described by KKM. First, the environment of higher education has been much more stable, reducing the pressure for change, although some feel the ongoing recession coupled with declining student enrollments have now ignited pressures for organizational change. . Second, the organizational designs of many colleges and universities already incorporated many features of the "enlightened" human resource practices emerging in private sector industry.

D. Environmental Factors

In respect to environmental forces, it has been suggested that institutions of higher education will have to adopt the marketing lessons derived from the restructuring of the private sector by narrowing degree offerings and finding market niches, rather than by continuing to offer a full range of program offerings (The Chronicle of Higher Education, January 31, 1990). While such a restructuring of American higher education would have profound implications for the academic labor and human resource system, its emergence appears fragmentary at this point in time. The findings of Burke's 1987 study are probably a more accurate indication of change in academic labor and human resource systems. The stability of academic institutions underlined in that study occurs because over recent decades the academic environment has been relatively stable when compared to many private sector institutions. Academic institutions have not been directly affected by government deregulation, changes in market structures, or by global competition, although declining federal, state, and local funding of higher education that may derive from these forces affecting the private sector has no doubt had some economic impact. But, one only has to compare the state of affairs in higher education to the highly competitive and unpredictable computer and auto industries, where high double digit percentage swings in revenues and massive billion dollar losses have been all too commonplace in recent years, to appreciate the stability of academic life. Student enrollments are stable and predictable because student populations are known years in advance and shift a few percentage points at best from year to year. Until recently, funding sources, whether derived from tuition revenue, tax dollars, endowment income, or private donations, have also been relatively predictable, rarely shifting a few percentage points up or down each year, with the down cycle being of a relatively short duration. this sort of predictability does not foster major transformations in educational systems and their derivative labor and human resource systems.

E. Organizational Factors

Since the transformation of workplace practices taking place in the private sector mimics the human resources practices that have existed in many faculty jobs for a long period of time, there was no need for the same changes in faculty jobs. For example:

1. Authority

Faculties, to varying degrees depending upon the type of institution, have exercised authority over job level, administrative, and strategic decisions based on their power of knowledge -- institutions had to decentralize authority to the experts because they had the knowledge to select, promote, and tenure colleagues, and to keep academic programs up-to-date and research on the cutting edge. An example: a president who is not a physicist cannot evaluate the credentials of physicists for the purpose of making personnel decisions with a great deal of effectiveness. In recent

decades, there is evidence that faculty authority has waned, particularly in statewide systems where authority has been centralized from individual institutions. Indeed, the growth in faculty bargaining has been, in part, attributed to this erosion of professional authority. But this is not a new development. And, overall, faculty at many institutions still exert substantially more authority over a wider range of decisions than any of the more advanced examples from the private sector. What could be of more strategic importance for relating the academic enterprise to its constituencies, than, for example, curriculum design, a primary faculty responsibility?

2. Employment Security

Most institutions of higher education have provided employment security for faculty for the purposes of protecting academic freedom since early in the century. There is little evidence to indicate that the system is in danger of major chances, although the much greater use of part-time faculty, particularly in two-year institutions, and limits on the proportion of faculty that can be tenured, have offset some of the inflexibility of the tenure system.

3. Job Designs

Faculty job designs are already both vertically and horizontally less specialized than were private sector blue collar workers. The faculty have much greater authority over a wider range of tasks. Allocation of faculty among jobs also has not been subject to job control unionism where seniority is a greater part of the personnel allocation process. However, work teams in which the members are interchangeable among all jobs are more difficult to develop around faculty positions. The high degree of specialization of knowledge into narrow disciplines limits the degree of faculty interchangeability, often even within the same discipline. The operational effect of this reality is that the ability of an institution to balance faculty resources through internal reallocation is limited. The division of knowledge into such narrow disciplines is one of the greatest sources of inflexibility in higher education institutions. There seems to be little impetus for change, although there have been some efforts to retrain faculty to broaden their capabilities. For the most part, however, faculty are responsible for training themselves. Without employment security, narrowly-trained faculty would by and large find little security in institutional transfer, promotion, or layoff procedures.

One reason for the minimal change in faculty job designs and the derivative human resources policies is that the technology underlying knowledge transfer has been slow to change. Two-year institutions seem to have made the most progress in adapting contemporary audio-visual and computer technology to the classroom knowledge transfer process, while overall prestigious, research universities appear to have made the least progress in this regard. Will the need for highly specialized teaching faculty diminish as we rely more on software and hardware to transfer knowledge?

4. Flexible Compensation

In respect to flexible compensation, depending on the type of institution, faculty may be rewarded on the basis of individual performance, even when unionized. Examples in state or two-year institutions tend to be less frequent. The incidence of compensation based on group or institutional performance are virtually non-existent. Perhaps if objective measures could be achieved for student enrollment goals both in terms of number and quality, and for student and faculty performance, then linking faculty compensation to unit or institutional performance might be possible. But how likely is this to occur even under prolonged financial exigency?

5. Status Differentials

Status differentials in higher education have never been as extensive as they have been in private industry. Faculty and administrators alike are paid by salaries, have similar, if not identical benefits, and they usually eat in the same cafeterias and park in the same lots. They also dress more alike than not. Salary differentials between faculty and administrators are relatively small, and faculty superstars in certain disciplines may earn more than the top administrator. Even the provision of housing and autos for top administrators does not make the gap large, particularly compared to the fact that corporate leaders earn, by some estimates, twenty to thirty times what the average worker does. In general, the fact that substantially all administrators arise from the operating core of the organizations, tends to make academic organizations more integrated when compared to industry.

In sum, the faculty labor and human resource system contains many of the policies in the early process of being established in the private sector in the United States (and well-established in that sector in other countries like Germany and Japan). it is somewhat ironic that many of the same policies that have been viewed as necessary in the private sector for creating flexible organizations responsive to economic change, for example employment security and governance, have been viewed as inflexible impediments to change in academia. Perhaps these policies are not as inflexible as we thought in terms of the commitment they build for change.

STAFF LABOR-MANAGEMENT RELATIONS

There appears to be no substantial transformation in staff labor-management relations either, although the absence of research makes generalizations difficult. While comprehensive data on the extent of staff union membership is unavailable, it does not appear that there have been significant losses, indeed, the staff at several ivy league institutions have been organized in recent years. In terms of the bargaining process, the initial structures, which were similar to the faculty bargaining structure, appear to be little changed. Some institutions have experimented with mutual gains bargaining techniques.

The key difference between faculty and staff employees, of course, is that most staff employees did not already enjoy the benefits of the faculty labor and human resource system because they did not have the same power of specialized knowledge. Staff governance systems have not been prevalent, although some institutions included some staff in institutionwide deliberations or developed separate governing bodies at least for middle range administrative staff. Quality circles have been tried at a few institutions, but the efforts have been limited to a particular unit and difficult to sustain (Simmons and Kahn, 1990). For example, at the University of Cincinnati there were two maintenance circles operating. At Iowa State there were two units in the physical plant, while at the University of Pittsburgh there were administrative and clerical circles in the library and a clerical circle in the business school (simmons and Kahn, 1990). the decentralized control of working conditions of many staff members complicates the process of developing an institution-wide strategy.

There has been little apparent effort to broaden job designs and revamp the numerous job classifications on many campuses. Again, the diffusion of staff employees across units makes this a difficult process for many employees. Systematic staff training has always been an underinvested area in higher education (Marciano and Kello, 1990), although tuition waivers for credit and/or non-credit programs offered by the employing institution are commonplace. A review of CUPA Journals indicates that flexible compensation may be applicable at some institutions to merit improvements based on individual performance, but compensation based on group or organizational performance have not been discussed in the literature, nor have employment security programs for staff employees been widely discussed and applied. Status differentials among faculty and staff, and staff and staff managers are not as extensive in higher education, although the substantial differences in the faculty and staff work systems are sometimes a source of tension for staff workers in daily contact with faculty.

SUMMARY AND CONCLUSIONS

In sum, there appears to be little substantial transformation taking place in faculty and staff employment systems; innovative programs have been or are being tried at many institutions, but are not consistently applied across the higher education enterprise. This outcome derives in large measure from the fact that the relatively stable, predictable environments have not driven substantial structural and programmatic changes in most institutions, at least not yet. And, in respect to faculty, an employment system with many aspects of the high commitment system sought by private industry has been in place for some time.

But, what of the future? If the academic environment becomes unpredictable, will the employment system permit flexible adaptation to change? When considered in international terms, the fact that our higher educational system is considered to be the best or among the best in terms

of program, the enterprise has effectively adapted to its external constituency. In other words, decentralized faculty control over the product has kept academic programs reasonably responsive to and perhaps ahead of societal needs in some instances, and, therefore, in demand. In a sense, the fact that academic institutions have proven themselves as useful to society has stabilized demand for their services. What will undo this demand -- economic catastrophe? If this should somehow occur, the high division of knowledge into disciplines and sub-disciplines will likely hinder responsiveness, because collegial decision-making does not work well when faculty backs are against the wall protecting their own disciplines or units. In a time of prolonged economic stress, unless faculty become less myopic about the division of knowledge and look beyond their own disciplinary interests, the need for substantial change will be accompanied by the centralization of authority to administrators.

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THE STATE OF UNIONS IN HIGHER EDUCATION

E. UNIONS IN A BATTERED ACADEMY

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Two weeks ago, at a critical point toward the end of the season, the players of the National Hockey League called a strike. Norman Green, the owner of one of the teams, the Minnesota North Stars, bemoaned the strike as unnecessary. What was necessary, he said, was a stronger league negotiator and a strong union "for the players and the owners to develop the strong partnership that both say they want in the future." According to The New York Times, which characterized him as "a member of the league's moderate faction of leaders," Mr. Green reasoned that "a strong union is a better partner than a weak one for us to build on. From the viewpoint of a strike being called to make sure the union is strong, I don't find any great discomfort with that."[1]

It is a far cry from hockey to academe. But the principle expressed here goes a long way toward identifying the impact of collective bargaining in higher education. Since we have a record of twenty years to examine, we can draw some preliminary conclusions. And since many colleges and universities are nonunionized, we can see some contrasts in the modus vivendi of those with and without collective bargaining today.

Early in its history, expectations among scholars of faculty unionism were not great. In fact, they were downright gloomy, especially in the realm of governance.

In 1973, Edward J. Bloustein, then president of Rutgers University, had the rare opportunity to compare his experience there, a unionized university, with his six years of experience at Bennington College, which was not unionized. On the suggestion, which was common in those days, "that the adversary relationship implicit in collective bargaining is inimical to collegiality," he had this to say:

> ...this is not a consequence of the trade union movement. Collegiality had broken down at Bennington College without a trade union. What has happened is that our faculty and our student body and even our boards of governors have now found that their interests are not as common and not as

> united as they once were. There is now a frank recognition that there are adverse interests.... In the case of the college or university that is unionized, the difference is not that we suddenly find adverse interests where none appeared before, but rather that we find an adverse interest represented by an organized group of faculty who identify with that interest.[2]

Testimony like this was scarce in those early days and so it could be dismissed in deference to the intuitive feelings of the authorities. They predicted that "collective bargaining is likely to diminish the influence and scope of operations of senates and other traditional governance mechanisms."[3] What is worse,

> Effective faculty unionization will tend to tilt the balance of power on campus away from presidents, chancellors, and deans. Instead of setting basic institutional policy, their prime responsibility will probably be to carry out the terms of union contracts. Many of the current mechanisms for faculty participation in governance -- senates, committees, an so on -- probably will remain, but they may become mere shadow governments. One will be the increasing power of, and discipline exercised by, leaders of state and national unions -- probably professional labor executives long removed from campus experience. The inherent collectivist orientation of unionism suggests, however, that 'the greatest good for the greatest number' will prevail; individual institutional objectives will be subordinated."[4]

As the evidence to the contrary accumulated, it continued to be systematically ignored. In 1983, academics were still being told:

> Substitution of an adversary mode of governance for the collegial mode is a fundamental alteration in decision-making processes. Even if unions confine themselves to settling issues of terms and conditions of employment by negotiation and arbitration, coexistence of union activities with traditional collegial resolution of program and policy questions can be difficult to maintain.[5]

By 1986, when the truth of a substantial record was inescapable, this convolution was offered:

> Collective bargaining, once it is established and the parties become accustomed to it, appears to work smoothly in many institutions, and in a surprising number of cases both parties express satisfaction with the arrangement. Our view, nevertheless, is that collective bargaining is not the optimal arrangement for people in a profession in which collegiality and community are essential.[6]

One verdict has been handed down convincingly by two decades of experience: The set of negative effects on governance forecast at the birth of unionism has not materialized. The expected conflict between collective bargaining and faculty governance has not happened. In fact, "faculty as a whole gained formal governance power through the union contract. Even on campuses where faculty had enjoyed considerable decision-making power, the contract legitimated and in many cases broadened the scope of the faculty governance role." Collective bargaining has not, as widely anticipated, rendered the relations between faculty and management more adversarial.[7]

It is questionable that the theological notions that inhabit the faculty's mythic past have been exorcised. Old myths -- especially about the putative good old days -- die hard. But we need not go to the past to uncover the realities of nonunionized collegiality and faculty governance. Just three days ago, the nonunionized faculty of Columbia University's College of Arts and Sciences scheduled a meeting to confront a range of administrative fiscal decisions. In its letter to the faculty, its executive committee wrote:

> It is essential that faculty have trust and confidence in their leaders if painful reductions are to be made while maintaining our essential faith in Columbia's future. Our consultations with faculty in the Arts and Sciences suggest that the competence of the administration is being questioned and that trust is low.[8]

This set of events is not exceptional. It has occurred many times at many institutions over the years. Because it is so common, it illustrates a number of dynamics relevant to our deliberations here today: First, the vaunted primacy of faculty in the decision making of colleges and universities -- and nowhere is it so entrenched as at institutions like Columbia -- exists at the sufferance of administration. On matters of greatest moment, faculty must assert its prerogative, often in a reactive rather than proactive manner. The predisposition of academic management to disregard faculty governance rights is a well-established impetus to unionism. Second, the breakdown of collegiality has nothing to do with the recalcitrance or belligerence of the faculty, unionized or nonunionized, but with the misjudgments and sometimes compulsions of academic management in attempting to abrogate to itself the full academic policy role.

Management's predisposition to do that becomes irresistible in matters of money. It remains so, undiminished, at unionized campuses as well, despite the role assumed by faculty unions -- a role no pundit anticipated -- in bringing money into the institution. Like other workers, professors have a vested interest in the well-being of their employer. Unlike trade unions, however, faculty unions have the capacity and the leverage in the public sector to advance their institutions' welfare. The circumstances of the last twenty years have given those organizations the opportunities, if not the imperatives, to exercise that capacity and leverage.

I hope that those who write the early history of faculty bargaining will not blame unionization for the fiscal disasters and academic deformities that riddled its early history, although I will not be surprised to read it. The convergence of economic downturns with expansion of college access in the public sector have rendered faculty unions adversity-challenged from their start to the present.

What made union political action imperative on behalf of colleges and universities and their administrators has been the widespread self-immolation of academic managers. Misuse of research funds, fraud in the laboratory, price fixing in tuition and financial aid to students, violation of recruitment and scholastic standards for athletes -- these and other ethical lapses at the top and in some of our most prestigious institutions have left a gap of credible leadership in higher education. Unions can never fill the gap, given the realities of their function. But to an extent that would have surprised the forecasters, they remain among the strongest institutions within a battered academy.

Academic unions have transcended the boundaries of fragmented universities and have emerged as vital institutions defending the faculty's professional interests. With their national affiliates, local unions are faculty bodies capable of mobilizing the resources of academe in meeting the severest challenge of the fin de siecle. This balance of success, measured against predicted failure, is the testimony of countless faculty struggling to make their universities better.

ENDNOTES

1. Joe LaPointe, "North Stars Owners Call Strike Unnecessary," The New York Times, April 3, 1992. See also "Labor's Showdown at Federal Express," The New York Times: Business, Feb. 27, 1993, pp. 1, 6.

2. Edward J. Bloustein, "A Chamber of Horrors?" in The Effects of Faculty Collective Bargaining on Higher Education, Raymond G. Hewitt, ed. (Wellesley, MA: New England Board of Higher Education, 1973), p. 14.

3. Kenneth P. Mortimer and G. Gregory Lozier, "Collective Bargaining: Implications for Governance," Insights into Higher Education: Selected Writings of CSHE, 1969-73, Vol. 1, Winter 1974: Governance (University Park, PA: Center for the Study of Higher Education, Pennsylvania State University), pp. 35-52.

4. Fred E. Crossland, "Will the Academy Survive Unionization?" Change, 8:1, Feb. 1976, pp. 38-42.

5. David R. Powers and Mary F. Powers, Making Participatory Management Work (San Francisco: Jossey-Bass Publishers, 1983), p. 109.

6. Howard R. Bowen and Jack H. Schuster, American Professors: A National Resource Imperiled (New York: Oxford University Press, 1986) p. 261.

7. Barbara A. Lee, "Governance at Unionized Four-Year Colleges: Effect on Decision Making Structures," Journal of Higher Education 50:5, Sept.-Oct. 1979, pp. 565-585. See also Irwin Yellowitz, "Academic Governance and Collective Bargaining in the City of New York," Academe 73:6, Nov.-Dec. 1987, pp. 8-11: "Academic governance is alive and well in CUNY. It also is more secure. Collective bargaining and academic governance have proven to be complementary means of faculty participation in their professional lives, and each has prospered from the success of the other."

8. Robert D. McFadden, "Columbia Faculty to Meet About Leadership Concerns," The New York Times, April 11, 1992.

II. INDIVIDUAL AND COLLECTIVE RIGHTS IN THE ACADEMY

A. The Impact of the Constitutionalization of Higher Education on Collective Bargaining: Individual Rights vs. Collective Action

B. Professional and Legal Limits to Academic Freedom

C. Academic Freedom: Are There Permissive Parameters to Free Speech in the Academy?

D. Peer Review and the Union: Hero or Hostage?

INDIVIDUAL AND COLLECTIVE RIGHTS IN THE ACADEMY

A. THE IMPACT OF THE CONSTITUTIONALIZATION OF HIGHER EDUCATION ON COLLECTIVE BARGAINING: INDIVIDUAL RIGHTS VS. COLLECTIVE ACTION

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Since the early 1950's, successive federal court decisions have brought the Constitution to the public campus in a variety of ways. Several of these decisions, such as City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission (1976) and Chicago Teachers Union v. Hudson (1986) have had specific impacts on collective bargaining in higher education and elsewhere. Many additional cases, including Board of Regents v. Roth (1972) and Perry v. Sinderman (1972), speak directly to the constitutional rights of faculty at public universities and colleges. Others, such as Sweatt v. Painter (1950), Board of Curators of the University of Missouri v. Horrowitz (1978), and the celebrated Regents v. Bakke (1978) decision have had more impact on students, applicants, and administrative processes. Still other cases have made the faculty and administrators of public universities and colleges potentially liable for "constitutional torts."[1] In the aggregate, these and other decisions have had the revolutionary effect of constitutionalizing higher public education.

Applying the Constitution to employment relationships and other aspects of higher public education inevitably has significant consequences for collective bargaining. Constitutional rights declared by the bench cannot be negated at the bargaining table, especially when liability for constitutional torts is potentially extensive. For instance, if a union shop violated freedom of association, it cannot feasibly be imposed. If faculty and other employees enjoy broad rights to freedom of speech, expression, and equal protection, then concepts of "at will" and probationary employment are modified. The purpose of this presentation is to provide an overview of how higher public education became constitutionalized since the 1950's and to consider the impact of this development on collective bargaining.

CONSTITUTIONALIZING HIGHER PUBLIC EDUCATION: THE THREE PRONGS OF A REVOLUTIONARY LEGAL CHANGE

The federal judiciary brought the Constitution to higher public education as part of a much larger process of constitutionalizing public administration generally.[2] The Warren Court (1953-1969) initiated the process of placing public administration and public higher education under constitutional constraints by declaring new rights for individuals as they came into contact with public institutions and agencies. Despite widespread expectations that it would move in other directions,[3] the Burger Court (1969-1986) expanded individuals' rights even further. Moreover, it vastly extended public administrative liability for constitutional torts. During both periods, the lower federal courts moved in similar directions. Because violations of newly established rights required remedies, the federal judiciary as a whole became increasingly concerned with remedial law as well. The new rights, enforcement mechanisms, and remedies fit together coherently into a fundamental shift in constitutional doctrine that has had far reaching effects of the entire civilian public sector.

1. New Rights

Prior to the 1950's, most people coming into contact with public agencies and universities had remarkably few federally protected constitutional rights. Relationships between public organizations and their clients were generally governed by the constitutional "doctrine of privilege." Legal theory under this doctrine drew a sharp distinction between rights and privileges. Due process and other protection applied where rights were denied, but not when individuals were deprived of privileges. In application to higher public education, this logic was illustrated by Hamilton v. Regents (1934). California required students in the state university to enroll in a Reserve Officers Training Course (ROTC). Students, claiming conscientious objection to war on religious grounds challenged the rule. The U.S. Supreme Court dismissed the students' claim with near incredulity:

> California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education...
>
> Viewed in the light of our decisions, that proposition must at once be put aside as untenable (Hamilton v. Regents, 1934:262).

The students remained free to exercise their religion under First Amendment protection. They would lose only their privilege of attending the state university.

The same doctrine of privilege applied to public employees, including those of state colleges and universities. For instance, in Adler v. Board of Education (1952), the

Supreme Court reasoned that a public school teacher denied employment due to membership in a subversive organization

> ...is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom os speech or assembly, except in the remote sense that limitation is inherent in every choice [493].

Under this approach, membership in labor unions, too, could lead to dismissal, as could the exercise of other constitutional rights.

The doctrine of privilege was severely eroded by a number of Supreme Court decisions during the 1950's and 1960's.[4] By 1967, in Keyishian v. Board of Regents of New York, the Supreme Court was able to agree that "...the theory that public employment which may be denied altogether may be subjected to any conditions regardless of how unreasonable, has been uniformly rejected" (605-606). Eventually the substantive, procedural due process, and equal protection rights of both clients and public employees were given extensive judicial support.

State universities and colleges were directly affected by the change in constitutional doctrine. Equal protection required desegregation of higher public educational facilities and systems. Faculty and other employees were afforded constitutional protection against dismissal for exercising their constitutional rights to freedom of speech, belief, and association. Constitutional due process could be used to protect their tenure or other contractual employment.

Decisions dealing with the rights of public employees have become part of the employment relationship in public higher educational institutions. Consequently, they may have very direct impacts on the scope of bargaining and other aspects of labor relations. The Supreme Court seemed cognizant of the relationship between bench and table in Bishop v. Wood (1976):

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that the official action was regular and, if erroneous, can best be corrected in other ways.

Based on this perspective, the Supreme Court and the lower courts generally have been reluctant to constitutionalize some aspects of the public employment practices, even though they may interfere with employees'

constitutional rights. Residency requirements, which abridge freedom of association and travel, are an example. Not being unconstitutional, such requirements may be negotiable.[5] Personal appearance standards and regulation of outside employment are other areas that have not been constitutionalized.[6] Generally, however, a public employer will have to show a strong nexus between such a regulation and the promotion of a legitimate governmental interest.

2. New Liabilities

The second prong of the constitutionalization of public administration and public higher education was the extension of liability for constitutional torts to most public employees and to local governments. The judiciary accomplished this change by switching the common law presumption that most public officials were absolutely immune from liability suits for money damages to a presumption of qualified immunity only. Put simply, within the context of the main legal vehicle for redressing constitutional torts committed by nonfederal public employees, the person acting under color of law is immune from liability suit only insofar as his or her action did not violate clearly established constitutional or federally protected statutory rights of which a reasonable person would have known. Local governments may be held liable if their policies abridge individuals' constitutional rights, including those of their employees. Local governments may be held liable for inadequately training their employees when it is foreseeable that this failure will lead directly to violations of constitutional or federally protected statutory rights.[7]

Although states and their agencies retain absolute immunity, their employees are vulnerable to personal capacity suits for unconstitutional actions taken within the framework of government authority.[8] The liability of federal officials flows directly from the Constitution (First, Fourth, Fifth, and Eighth Amendments in particular), though federal and nonfederal precedents are considered interchangeable. Officials engaged in judicial and legislative functions (not job titles only) retain absolute immunity, as does the President of the United States.[9] In fashioning the new liability, the Supreme Court sought to create standards that would deter violations of constitutional and federally protected statutory rights, compensate victims, and also protect public employees from unfounded or harassing suits.

The new liability for constitutional torts is of importance to the employment relationship in higher public education because it adds another deterrent to violation of employees' constitutional rights by administrators. For instance, if the "war on drugs" moves to the state campus, potential liability may bolster faculty members' Fourth Amendment protection against unreasonable searches and seizures. Community and municipal colleges are liable for any policies that violate individuals' protected rights.

3. The Rise of Remedial Law

The third prong of the revolutionary doctrinal changes that constitutionalized public higher education and public

administration is also related to enforcement. Remedial law, also called "public law litigation,"[10] has come to encompass vast judicial involvement in the operation of public school systems, mental health facilities, prisons, personnel systems, and other areas of public administration. Though currently less pronounced, in the past courts were deeply involved in the desegregation of state higher education.

The growing scope of remedial law is perhaps best illustrated by the shift from the call in Brown v. Board of Education of Topeka (1954) for desegregation with "all deliberate speed," to a district court's requirement that a local jurisdiction raise its taxes in violation of state constitutional requirements in order to pay for very plush magnet schools as a means of desegregating a metropolitan school district.[11] Another illustration is that in the early 1980's, about half of Boston's operating budget was under judicial supervision -- schools, jails, personnel, mental health, and public housing being the chief targets of remedial law.[12]

IMPACT ON COLLECTIVE BARGAINING IN HIGHER PUBLIC EDUCATION

For the most part, the revolutionary changes in constitutional law described above have protected public educational employees' constitutional and statutory rights, but weakened collective bargaining. The expansion of public employees' freedom of association and speech have secured their rights to form and join labor unions and to engage in concerted action such as picketing and handbilling.[13] But there is no constitutional right either to engage in collective bargaining or to strike. Moreover, in strengthening individual rights, the courts have unavoidably weakened collective organization. There is a clear tension between expansive individual rights and individual subordination to a collective interest, even though that interest seeks to enhance the individual's job security, workplace rights, and general welfare. Two Supreme Court decisions illustrate this tension well.

City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission (WERC) (1976) addressed a confrontation between a public school teacher's First Amendment rights to freedom of speech and the collective bargaining principle of exclusive recognition. A board of education held a public meeting while negotiations for the renewal of a contract were taking place with an exclusively recognized bargaining agent. At the meeting, a teacher who was in the bargaining unit but not a member of the union, spoke for approximately two and one-half minutes in opposition to the union's effort to obtain a "fair share" provision. When the union failed to win such a provision, it filed a complaint with WERC on the grounds that its right of exclusive recognition had been violated. WERC found for the union. The school district challenged WERC's ruling in the Wisconsin courts on the grounds that the teacher's right to freedom of speech on a matter of public concern at a public meeting necessarily overrode the principle of exclusive recognition. When the Wisconsin Supreme Court held that the teacher's First Amendment rights were appropriately abridged because his

speech presented a clear and present danger to the government's interest in productive labor-management relations, the district appealed to the U.S. Supreme Court.

Speaking for the Court, Chief Justice Burger gave short shrift to the decisions below:

> ...to permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech [175-176].

He went on to add that "...restraining teachers' expressions to the board on matters involving the operation of the schools would seriously impair the board's ability to govern the district" (177).

The holding in Madison School District has very broad implications for the principle of exclusive recognition. As part of the development of new rights for people as they come into contact with public agencies, public employees now enjoy extensive freedom to express their thoughts publicly or privately on matters of public concern.[14] As Madison School District points out, public employees' speech to their employers is fully protected and, in the Supreme Court's view, clearly in the public interest. Bargaining unit members who are opposed to their agent's agenda have a constitutional right to so inform their employer.

Chicago Teachers Union v. Hudson (1986) addressed the "fair share" (or "proportionate share") issue directly. Earlier, in Abood v. Detroit Board of Education (1977), the Supreme Court held that "...nonunion [public] employees do have a constitutional right to 'prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative'" (Chicago Teachers Union: 301-302). In the Teachers Union case, the Court addressed the tension between individual rights and collective action directly:

> Procedural safeguards are necessary...for two reasons. First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee -- the individual whose First Amendment rights are being affected -- must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim [302-303].

The Court's holding placed the following constraints on the administration of fair share arrangements: "...the constitutional requirements for the Union's collection of agency fees include adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending" (310).

THE REHNQUIST COURT IS NEXT

Collective bargaining in the United States has been in decline for several decades. In the private sector, membership has dwindled. In both the private and public sectors, employers have grown more adept at dealing with strikes and busting unions. President Reagan's handling of the PATCO strike in 1981 was a decisive victory for the employer's authority over the workplace that has come to symbolize the vulnerability of unions. It is ironic, therefore, that in the process of expanding the rights of public employees dramatically, the federal courts have also made collective organization more difficult. The principle of exclusive recognition has been fundamental to the American collective bargaining process. However, the Madison School District case would seem to make that principle unenforceable -- at least where employees are speaking as individuals or on behalf of other employees, if not even when they are representing a rival bargaining agent. Similarly, union security arrangements, such as the union shop and agency shop, have long been thought necessary to eliminate the "free rider" problem that has plagued unions, such as those representing federal employees.[15] Abood makes it clear that the union shop would be unconstitutional in the public sector and the Supreme Court's decision in Chicago Teachers Union makes administration of fair share arrangements more burdensome (and probably less lucrative) for unions. Other decisions, while protecting employees' rights, diminish the scope of bargaining by adding layers of constitutionalization to the public employment relationship. Although ironic, the net result is not really surprising. Individual constitutional rights are sometimes in tension with collective action. The freedoms to associate and speak include the freedoms not to associate and to remain silent or to oppose.

What does the future hold? Given its record to date, there is no reason to think that the Rehnquist Court will embark on a "counter revolution" that significantly reduces individuals' rights in the context of public administration, except, perhaps, where law enforcement is at issue. Indeed, to date, several of its decisions have expanded those rights.[16] It has not rolled-back on the liability of public employees for constitutional torts. Although it has dramatically reduced state liability for such actions, it has expanded that of municipalities. The Court seems unlikely to expand remedial law, but it reluctantly acceded to the district court's very intrusive remedy in Missouri v. Jenkins (1990);. Further, the Court might well overturn Garcia v. San Antonio Metropolitan Transit Authority (1985), returning to the National League of Cities v. Usery (1976) position, written

by Rehnquist for the Court, which would resuscitate the Tenth Amendment as a barrier to a national collective bargaining law for the public sector (were it in the offing). Finally, although the path of constitutional development has many unanticipated twists and turns, it is difficult to foresee circumstances in which the current Supreme Court would uphold practices that enhance the strength of collective bargaining and unions at the expense of already well-established individual constitutional rights. In sum, the constitutionalization of higher public education makes it unlikely that the courts will be a forum for strengthening collective bargaining in the 1990's.

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ENDNOTES

1. For a brief discussion and bibliography, see Rosenbloom (1983: 185-200).

2. See Ibid. for a full treatment.

3. Vincent Blasi (1983).

4. William Van Alstyne (1968).

5. McCarthy v. Philadelphia Civil Service Commission (1976).

6. Alexander and Alexander (1984: chapters 16-17).

7. Harlow v. Fitzgerald (1982); Haver v. Melo (1991); Pembaur v. City of Cincinnati (1986); City of Canton v. Harris (1989); Collins v. City of Harker Hights (1992).

8. See Hafer v. Melo (1991).

9. See Burns v. Reed (1991); Nixon v. Fitzgerald (1982).

10. Chayes (1976).

11. Missouri v. Jenkins (1990).

12. Turner (1981).

13. See Rosenbloom and Shafritz (1985: chapter 4) for an overview.

14. See Rankin v. McPherson (1987).

15. Levitan and Noden (1983).

16. Eg., Rutan v. Republican Party of Illinois (1990); First English Evangelical Lutheran Church v. Los Angeles (1987); Nollan v. California Costan Commission (1987).

INDIVIDUAL AND COLLECTIVE RIGHTS IN THE ACADEMY

B. PROFESSIONAL AND LEGAL LIMITS TO ACADEMIC FREEDOM

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Academic defenders of academic freedom (I count myself in that teeming company) tend to be disquieted by attempts to define its limits: efforts to pound boundary markers into this fragile terrain have been known to produce slippery slopes. And I think they feel a particular unease when one of their own number (like myself) sets out to circumscribe this estate. By now, most have come to accept it as a fact of life that the members of a different profession -- the judiciary -- will have much to say about what academic freedom does and does not cover in the course of determining the parameters of the freedoms protected by state and federal constitutions. But a libertarian member of the academic profession who sets out to limit its coverage on professional grounds may strike his comrades as asking for trouble or as exhibiting a treacherous change of heart.

This is not to say that persons in this camp believe that the territory guarded by academic freedom should be so vast that professors should be able to do or say anything they please safe from institutional sanctions. Few academics would maintain that academic freedom should extend to actions deemed professionally improper by persons qualified to judge (plagiarism and pilfering, for example, seldom arouse much custodial passion in the average academic-freedom lover's breast, even when they are implemented by utterances or writings). On the other hand, few would give untroubled assent to the proposition that academic freedom should be so delimited as to place the articulation of ideas at risk. The notion that a profession wedded to the "free exchange of ideas" in an institution calling itself a "marketplace of ideas" may legitimately reprove or banish ideas may strike many academics today as a risky and incongruous innovation not in keeping with the secular tolerance from which the principle of academic freedom springs, and apt to do mischief to a profession for which academic freedom is a vital grace.

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Risky this notion surely is, but it is arguably not incongruous and it is certainly not a novelty. The view that faculty members may properly be disciplined for talking and writing unprofessionally, just as they may properly be disciplined for behaving unprofessionally, was proclaimed and exposited by the 1915 Declaration of Principles of the infant American Association of University Professors, a work that provides both a climactic windup to centuries of philosophizing about academic freedom and an invaluable aid to an understanding of academic freedom in its professional, rather than legal guise. Largely unaware of how deeply the organized profession had once been involved in the "limits" business, current academic defenders of academic freedom are too squeamish about drawing lines and, as a result, have failed to inform the cartography of the law with mappings informed by their own traditions.

I have written too much about the 1915 document to wish to descant all its riches once again, but I will take a little space to recall one of its central tenets -- namely that, for professional reasons, academic freedom should not go unreined.

In this capstone Book of Genesis, academic freedom is held to be the very lifeblood of the academic profession. Most of its pages are given over to an analytic defense of its three main components -- the freedom of academic scholars and scientists to pursue inquiry wherever it may lead and to publish the fruits of that inquiry without fear of institutional censorship; the freedom of academic teachers to teach students what they specially know and conscientiously believe even if what they teach runs contrary to the conscientious beliefs of those who hire them and pay their bills; and (an American innovation) the freedom of faculty members, as citizens, to give public expression to their views on mooted public issues safe from retaliatory threats by campus authorities with different views.

But in none of these arenas of expression did the professional founding fathers call for complete and unlimited freedom. "[T]here are no rights," they declared, "without corresponding duties."

> The liberty of a scholar to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry; and they must be set forth with dignity, courtesy and temperateness of language.

In the classroom, where they feared that a teacher's ill-chosen words might do harm to captive student audiences, they held that, while the teacher was under no obligation to hide his opinions "under a mountain of equivocal verbiage," he did have an obligation to be "judicial" and "fair" to his students, and to train them to "think for themselves" rather than to impose upon them "ready-made conclusions." In the so-called "extramural" area, that is, in the public arenas outside classrooms and laboratories where the faculty member

did not necessarily speak with the authority of acknowledged expertise, they held that faculty members, though full-fledged citizens, were duty-bound to preserve the dignity of their calling and the good reputation of their institutions, and thus were subject to precepts of decorum that other citizens were permitted to ignore. In a word, the principle of limitation was thought not to defy but to define the idea of academic professionalism; indeed, it was thought to be almost as defining as the principle of freedom itself.

The precise language in which limitations were cast would undergo nuanced changes as it travelled from the professorial monologue of 1915 to the faculty-administration pact of 1940, where it came to rest as the profession's most authoritative guide to the principle of academic freedom and to its metes and bounds. Thus, where the earlier document warned teachers to be on guard against "taking unfair advantage of the student's immaturity by indoctrinating him with the teacher's own opinions," the later document, less worried about the deliberate Svengali than about the rambling provocateur, admonished the teacher to be careful "not to introduce into his teaching controversial matter which has no relation to his subject." And where the earlier authors tried to raise the standard of academic public discourse by condemning "hasty," "unverified," "exaggerated," "intemperate" and "sensational" means of expression, their followers twenty-five years later preferred to cast the standards more affirmatively: a faculty member "should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman."

If the variations in phraseology show how difficult it is to codify speech restrictions that neither overshoot nor undershoot their mark and that satisfy every interest at the drafting table, the resemblances between the first statement and the last suggest that the same professional sensibility was at work on both. Quite deliberately, both sets of authors, by using soft-edged terms and dodging definitions, tried to avoid a listing of offenses that would have the look of an academic penal code. Neither before nor after did the limitationists try to draw up a list of precisely phrased transgressions that could touch off automatic sanctions and prevent a campus hearing body from taking account of the motives of a targeted faculty member and that person's record as a whole. Throughout, the professional draughtsmen sought, by sketching limits, to set before their peers an ideal character worthy of emulation, and thought it cannot be denied that the model bore a close resemblance to the authors' characteristics -- to the white Anglo-Saxon, Protestant, middle-class males they mostly were -- it might also be said that it gave praise to values -- civility, responsibility, tolerance, reasoned discourse -- that were universal in their appeal.

Is it possible to proscribe the uncouth expression of ideas without endangering the expression of unpopular ideas? A famous negative answer to this question was delivered by the great nineteenth-century libertarian, John Stuart Mill, and it still stands as the critique most to be reckoned with by

anyone who tries to distinguish "manner" from "matter" or assert that freedom and respectability can be safely wed. In his magisterial On Liberty, Mill decried as risky and hypocritical the notion that society should allow "the free expression of all opinions on condition that the manner be temperate and does not pass the bounds of fair discussion." Mill continued:

> Much might be said about the impossibility of fixing where these supposed bounds are to be placed; for if the test be offense to those whose opinion is attacked, I think experience testifies that this offense is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them . . . an intemperate opponent.[1]

He discerned behind the seemingly objective concern for mannerliness a lurking ex parte concern for substance.

> [T]he denunciation of . . . invective, sarcasm, personality and the like . . . would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion; against the unprevailing [opinion] . . . they are likely to obtain for him who uses them the praise of honest zeal and righteous indignation.[2]

No student of polemical discourse could doubt for a moment that on this point Mill was quite correct.

Note, however, that to Mill the battle for human liberty was waged between the individual and society; he did not contemplate the more intricate situation of individuals bound to the ethos of a calling even as they seek a license to speak their minds. The authors of the 1915 Statement were Mill's inheritors and disciples; if they were not deterred by his warning that constraints on "form" may compromise the protection of "content," the reason was hardly that they had never heard of it. Reading between their lines, I surmise that they accepted the risk of substance abuse in part because they felt it was unavoidable in a profession that tested its members for moral character as well as for technical competence, and that might thus reasonably look for characterological evidence in any tell-tale spoken or written word.

The reason they gave for ignoring the caveats of their oracle was that they thought the risk could be minimized: they were confident that, with the right approach to enforcement, a content-neutral etiquette could be devised that would not devolve into a tool of covert partisanship. For them, the right approach was to take the power to decide on and punish speech infractions out of the hands of the institution's lay authorities and vest it in the local faculty. They did not suppose that punitive measures of this sort would have to be taken very often. They were sure that

in most cases the academic's own sense of fitness would prevent excesses and, if this failed, that fear of collegial disapproval would do the trick. As realists, however, they conceded that from time to time the conscience of the individual and the informal pressure of colleagues would not be effective regulators, and that it might then be necessary for an intramural body to decide, on verbal evidence alone, whether a colleague was professionally unfit. But such a procedure, they thought, would be extremely hazardous if the current composition of the judging bodies remained unchanged.

> Lay governing boards are competent to judge . . . charges of habitual neglect of assigned duties, on the part of individual teachers, and also grave moral delinquency. But in matters of opinion, and of the utterance of opinion, such boards cannot intervene without destroying the essential nature . . . of the university.

I will not try to exhume all the assumptions that led these professors to believe that faculties were better suited than governing boards to distinguish properly between that which was ideologically unacceptable and that which was professionally unpalatable. Suffice it to say that this jurisdictional antidote to the worries raised by Mill could not override the realities of power in the American university. By 1940, the syndicalist solution of 1915 had been abandoned. But the institutionalization of academic tenure and academic due process would give most American faculties an opportunity to decide, at least in a hearing of first impression, whether a faculty member should be punished for professional unworthiness disclosed by speech.

Does it follow from the foregoing that professional limits to academic freedom are more restrictive than those prescribed by law? "Yes of course," says the cursory observer; the more careful inquirer is not so sure.

Generally, during the first half of this century, the organized profession, with all its ethical injunctions, took a more expansive view of the freedom due academic speech than did the state courts, which deferred to managerial discretion in personnel decisions under the prevailing "at will" interpretation of the employment contract, and the federal courts, which ruled that public employment was a privilege that could be withheld, regulated or rescinded without raising a valid constitutional objection. On the other hand, following the bruising campus battles over evolutionary science and populist economics in the last decades of the Nineteenth Century, the national learned societies helped to persuade many public and private governing boards not to censor the research findings of their professors, while the national faculty association helped spread the gospel of academic tenure, the best friend academic freedom ever had up to that moment, among campus powers heretofore devoted to the heathen doctrine of renewable and universal limited-term appointments. The early leaders of the AAUP, for all their self-denying precepts, did not make peace with autocratic presidents who treated faculty criticism of their persons or policies as an indefensible display of <u>lese majesty</u>, nor did

it accede to the unprincipled argument, often urged by university attorneys, that academic employers in relations with their employees had moral permission to do anything the law did not expressly forbid. If in that period some professors thought that their freedom to speak on and off the campus was more spaciously protected by the courts than by their own professional associations, the reason may have been that the former dealt most harshly and directly with types of criminalized speech, such as seditious, libelous or obscene expressions, that was not native to the academic tongue, while the latter took exceptions to breaches of decorum -- "intemperate" and "sensational" utterances, failure to preserve the "dignity" of the profession -- that were a part of the academic façon de parler. Had they judged the permissiveness of the law less by the utterances it expressly punished than by the speech constraints it overlooked or justified, I imagine that they would have thought that academic freedom under legal guardianship occupied a much smaller strip than that which the profession regarded as its domain.

In the last phase of the McCarthy era, the legal territory of academic freedom was expanded by a turn-about in constitutional law and by revised interpretations of the law of contracts. Among the events contributing to this expansion was the demise of the privilege-in-employment doctrine; the overthrow of the corollary notion that academic freedom in state-supported colleges and universities was a governmental gift that could be charitably bestowed and unilaterally retraced; the relinquishment of the master-servant metaphor as a guide to private faculty employment contracts; the elevation of academic tenure to the status of a property right that could be revoked by a state employer only through the due-process procedures required by the Constitution; and, a symbolic milestone, the inclusion of the phrase "academic freedom" in the general catalogue of freedoms protected by the First Amendment -- this after almost two centuries of judicial neglect.

The legal boundaries of academic freedom were thrust out, but did they leapfrog over professional lines? In my view, the safest answer is the unequivocal yes and no. Depending on the academic site (the laboratory, the classroom, the library, the intramural forum, the extramural sphere), the form of institutional control (public, private), the complaining party (administrators, faculty members, students), academic speakers in the post-McCarthy period would come to the edge of legal protection sometimes after and sometimes before they reached the line of professional impropriety.

A quick glance at two lines of cases may suffice to show that the law, even in the modern dispensation, has not always offered academic freedom the widest room.

(1) It became an axiom of constitutional law that a teacher in a state-supported educational institution who proves she has lost her position because of what she wrote or said does not thereby prove that her constitutional rights have been violated; before a federal court will reach that conclusion it must satisfy itself that the teacher's interest

in speaking freely is not outweighed by her state employer's valid interest in regulating her speech. In Pickering v. Board of Education,[3] the Supreme Court ruled favorably on the claim of a public-school teacher that his dismissal for having criticized the financial policies of his local school board deprived him of his constitutionally protected rights. In its result, Pickering was a victory for academic freedom, one of the landmark cases that sealed the responsibility of the courts to protect the constitutional rights of public-school and college teachers. But in its reasoning, Pickering paved the way for a funeral cortege of failures. The employee claim overbalanced the counterclaim of his employer wrote Justice Marshall for a bare majority of the Court, because his speech addressed an issue of broad public concern.[4] Thereafter, this would serve as a threshold that had to be crossed if the punished speaker would have a chance of prevailing (and other Court majorities would take a pickier view than Pickering as to what issues met the test of significance.[5]) In addition, the Pickering majority made it clear that the state would have prevailed if it had been able to demonstrate that the speaker's public words impaired its legitimate interest in the harmonious work relationships necessary to promote the efficiency of the services it performs. It failed to do so, Justice Marshall wrote, in part because the outspoken teacher had not disclosed any confidential information, and (since his comments had been met with "massive apathy or disbelief") because the speech had been ineffective.[6] In other words, the whistle-blower and the persuasive arguer might well have lost out in this, the most libertarian of twentieth-century Highest Courts. In my view, the very idea that academic freedom is engaged in a seesaw battle with work efficiency -- that two values, of equal legitimacy if not quite equal weight, teeter in the balance when public employees seek the constitutional right to criticize their employers -- is potentially far more limiting than the professional precept that academic freedom is of transcendent value, even when it protects mere employee gripes, but must be exercised with discretion.

(2) On the constitutional limits to teaching freedom, the Supreme Court has never spoken categorically; as a result, the limiting lines drawn by the circuit courts run every which way, depending on the facts of the particular case and the jurisdiction in which each case is decided. In 1983, one perceptive legal commentator wrote that:

> the eloquent rhetoric on 'academic freedom' found in the opinions of the United States Supreme Court creates the impression that the university classroom provides the professor with a higher order and greater quantum of first amendment protections than is available to those who follow less exalted callings. This impression, however, does not conform to . . . reality . . . . The constitutional truth is that the university administrations have virtually unfettered discretion to make curricular decisions, hire faculty members on the basis of their philosophic bent, fail to continue the employment of those hired, eliminate courses or indeed whole departments, sometimes on a statewide basis, and

> evaluate classroom performance -- all on the basis of content-based criteria[7] -- and all in the name of academic freedom . . . .

Only, she writes, if some "fool of an administrator were to announce publicly for the record that a particular decision was made to cast a pall of orthodoxy over the intellectual life of the university," would a curtailment of free speech in the classroom get into constitutional trouble.[8]

The author, Kathryn Katz, was perhaps a bit too sour and a bit too sweeping. By the time she wrote this piece, one federal district court had ordered the reinstatement of an assistant professor let go because he taught his subject from a Marxist point of view and was a member of the radical Progressive party.[9] By that time, as well, another court, in Parducci v. Rutland, had ordered the reinstatement of a teacher fired because he had assigned Vonnegut's Welcome to the Monkey House to a high-school class in defiance of his principal's objections.[10] Moreover, after Katz wrote her article, some court decisions moved the teaching freedom line out in new directions. One such was the 1989 ruling by the Sixth Circuit that the dean in a public university could not compel a professor to change a student's grade without running afoul of the First Amendment.[11]

Still, I think Katz was mostly correct: even the more expansive decisions seldom moved the markers of teaching freedom very far. The effect of Parducci was weakened by another circuit court in President's Council v. Community School,[12] which overruled a lower court's judgment that school teachers (rather than school officials) have a constitutional right to determine what material will be assigned to students. And in Parate v. Isibor, the court allowed that if the administration had not compelled the teacher to change the grade but had done so on its own, it would have been constitutionally in the clear, for then it would have been expressing itself freely and not curbing the expression of another.

I am not saying that the law is always stingier than the profession in these matters. In the line of cases that extended the protection of the First Amendment to schoolteachers and high school and college students, more ground was yielded to academic freedom than the AAUP had traditionally been prepared to grant. Indeed, in some cases involving academics, state and federal judges have refused to track the 1940 Statement of Principles of Academic Freedom and Tenure in their decisions on the ground that its limiting phraseology would commit the constitutional sin of overvagueness or would be impermissibly restrictive under post-Sweezy constitutional rulings.

Cases in which the courts greatly outdistance the profession bear special scrutiny. In my view, more can be learned about the basic differences between the mapmakers when the law is surpassingly generous that when, by comparison, it stints. This is one reason why I have chosen to devote the rest of this Article to a discussion of Levin v. Harleston,[13] a case in which a federal district judge's puristic reading

of the First Amendment ran roughshod over time-honored professional constraints. The fact that the amicus brief of the AAUP paralleled the reasoning and sought the result reached by the judge in this case gives me another reason for dwelling on it. It allows me to confront what I have up to this point only hinted at -- that the courts, when they are at their most libertarian, can induce the organized profession to desert its past.

Michael Levin served as a tenured professor in the Department of Philosophy of the public City College for seventeen years, but he did not secure a place in the martyrology of academic freedom until several years ago, when he submitted to the New York Times for publication a letter on the subject of black criminality. This letter wound up with a provocative question: "Is discrimination against innocent whites [through affirmative-action programs] a tolerable price for insuring jobs for blacks, while discriminatory inconvenience for innocent blacks [the refusal of shopkeepers to admit suspicious-looking black males to their stores] is too high a price for reducing the risk of murder for white store owners?" Foiling that bit of epistolary electricity, he commented in a book review for an Australian journal that blacks did worse than whites in school and on IQ tests because on the average they were less intelligent than whites, and that the only way they could be helped to succeed would be by lowering standards. After this, he wrote a letter to the American Philosophical Association Proceedings, contending that white philosophers had no reason to say "mea culpa" over the under-representation of blacks in their field, because the science of psychometrics shows they cannot meet the intellectual demands of that field and would not be able to even if racial discrimination were eradicated. These opinions, and others of a similar nature vented on television and in the student newspaper, not only served to make Professor Levin notorious; they also made his classroom the target of raucous and intimidating disruptions by groups of black students whose leaders, though identified, were never disciplined by the Administration; the disruptions were to go on sporadically, unpunished and undeterred, for several years. In addition, Professor Levin was subjected to a series of anonymous anti-Semitic attacks, minor acts of arson and several death threats.[14]

To make my own judgments of these behaviors clear, let me say at once that I regard Professor Levin's public depreciation of the intelligence of a racial group that makes up a large part of his college's student body as insensitive, his categorical conclusions drawn from a very unsettled science far from his own field as both foolish and foolhardy, and his desire to broadcast his belittling simplifications through the mass media as a sign that he was spoiling for a fight. Let me add that I regard the disruptive, threatening, and sometimes violent behavior of the students as unconscionable, and the failure of the administration to take effective steps to stop it as cowardly and contemptible. But, of course, to declare these judgments is not to settle the question of whether Levin's speech was legally entitled to the protection of academic freedom or was professionally out of bounds.

When it was first apprised of Professor Levin's views on the subject of black intelligence, the Faculty Senate passed a resolution condemning them as expressive of a degree of "racial prejudice" that was "[offensive to] our fundamental notions of human decency," and City College President Harleston added that sentiments of this kind had no place on the City College campus.[15] The net effect of these statements was to make the anti-hereditarian school of intelligence analysis the official policy of the City College. But when President Harleston asked the Faculty Senate to appoint a committee to comment on the advisability of taking disciplinary action, that body demurred, arguing that such a move would have a "chilling effect."[16] I pause to note an oddity: according to this voice of the profession on the campus, it did not lower the temperature of freedom when the Senate and the Administration compromised the neutrality of the institution by taking an official stand on a mooted public issue, but a veritable Ice Age threatened to descend if the representatives of the faculty had so much as pondered the possibility of advising that charges be filed against a colleague for what he said. These inconsistent concerns -- inconsistent in their own terms as well as with professional tradition -- would find their way into the judge's decision and into the AAUP amicus brief.

Unable to gain faculty support for the project, the President appointed his own committee "to review the question of when speech both in and outside the classroom may go beyond the protection of academic freedom (and) became 'conduct unbecoming a member of the faculty'" (this professional term of art came from the collective bargaining contract). None of the members of the seven-person ad hoc committee was a member of the Philosophy Department.[17] This omission did not sit well with Professor Levin and his supporters, but it is not in my view a serious taint, since Professor Levin's competence as a philosopher was not in question. Three members of the committee had signed a petition condemning Levin and their prejudgment was also much complained of, but in my view it would be like looking for caviar among the indigent to search, in a deeply divided academic community, for seven tablets that were completely blank.

President Harleston, who never seemed to tire of appeasement, informed a group of students who occupied his building to protest "the continued presence" of Michael Levin on the faculty that he had just set up a committee to consider their demand;[18] the impression he apparently left with them as they departed was that he and his committee were on their side. I doubt that the President hoped that the ad hoc committee would hand him the ammunition he would need to attack the tenure of Professor Levin, but if he did, he was in for a disappointment, for his committee was not about to egg him on.

The committee did declare that it would be "unprofessional" and "inappropriate" for an instructor to make denigrating classroom comments about the "intellectual capability" of a race, an ethnic group or a gender, since such comments, it held, had "a clear potential to undermine the

learning environment and place students in academic jeopardy."[19] What is more, it declared, that denigrating comments of this sort, even when made outside the classroom, could have a detrimental effect on the performance of students in the labelled groups within, since once those students became aware of those views they were likely to suffer from what they took to be the low expectations of their instructor. Nevertheless, the committee counselled against instituting disciplinary proceedings against Professor Levin, and the President took its advice.[20] Why did it not take a more martial stand? The committee's stated reason was thoughtlessly libertarian: it suggested in a one-line sentence that the out-of-classroom utterances of professors were absolutely privileged, even if they were obnoxious.[21] I respectfully submit that the committee acted politically: if it had urged disciplinary action against white Professor Levin, it could not have done less against black Leonard Jeffries, the chairman of the Black Studies Department, whose fulminations against Jews and whites had been gaining notoriety at the same time. Having, I presume, no heart for two commotions, it felt that discretion was twice the better part of valor.

I wish the committee had seen fit to consider each case on its merits and deigned to argue professionally. From all accounts, Professor Levin had taken great pains not to communicate his views on race differences to his students in the classroom; although his students might well have overheard these views in other contexts, I think his professional scruples in this regard did count in his favor. In addition, no formal complaint alleging unfairness against Professor Levin has ever been recorded by a student in all Levin's many years of service; even if we grant that formal records are not always faithful copies of what takes place behind the closed doors of a classroom, this absolving blankness cannot be ignored. Finally, although the options he expressed as a citizen (given their second-hand quality and the vehicles used to broadcast them, I would not grace them by calling them the products of research) left much to be desired in the way of scientific poise and caution, no one could (or did) argue that they were expressed in so unmannerly a fashion as to constitute a breach of the 1940 Statement. On these grounds, I would have put his expression of these ideas squarely in the zone of professional protection, and would also have voted, as the committee did, not to proceed against Professor Levin.

The ad hoc committee, however, did not stop there: after sparing Professor Levin, it sought to spare Professor Levin's students. It endorsed a plan, already in effect, of allowing students in the latter's required introductory course in philosophy to switch to a newly opened "parallel section" if they felt uncomfortable about being taught by someone with such "controversial views." (In the letter informing students of this option, the Dean who set up the shadow section stated that he was aware of "no evidence suggesting that Professor Levin's views on controversial matters have compromised his performance as an able teacher of Philosophy who is fair in his treatment of students"). In the ensuing semesters, between one-third and one-half of the students who would have normally registered for Professor Levin's course opted for the

parallel section. Coming on top of everything else, this administrative move, which he thought singled him out for attack on ideological, not pedagogical, grounds, and caused his student rolls to shrink, impelled the professor to seek the protection of the federal courts pursuant to the civil-rights acts and the First and Fourteenth Amendments to the Constitution.[22]

Judge Kenneth Conboy, who conducted the trial without a jury, concluded that "the defendant college officials have sought to and did punish [Professor Levin] in retaliation for and solely because of his expressed ideas, and that in so doing they have violated his constitutional rights and the civil rights laws of the United States."[23] Accordingly, the judge declared that the defendants were permanently enjoined from "commencing or threatening to commence any disciplinary proceedings against, or other investigation of, Professor Michael Levin predicated solely upon his protected expression of ideas."[24] He also enjoined the City College administration from "creating or maintaining the 'shadow' or 'parallel' section, if that too was predicated solely upon his protected expression of ideas."[25] In addition, the court granted Professor Levin permanent injunctive relief by ordering the Administration "to take reasonable steps to prevent disruption of [his] classes." In my view, except for the last injunction, which despite its indifference to institutional autonomy seems amply justified by administrative remissness, the court took a forward position on academic freedom that left the professional tradition not only in the rear but in the dust.

Does it really offend the Constitution to so much as examine the question of whether faculty members' utterances outside the classroom reflect on their professional fitness for their office? If it does, farewell the notion that rights entail responsibilities, that academic privilege should be wedded to conscientious conduct, and all the other classic maxims of professionalism. Does a public educational institution impermissibly stigmatize an idea when it relaxes compulsory attendance rules and lets students adverse to the bearer of that idea register for another instructor? To say "yes" is to go counter to professional instincts which demur at forcing students to pay a price for the academic freedom of their teachers when an alternative, not all that threatening to academic freedom on its face, is at hand.

It should be clearly understood that the issue is NOT whether speech that may possibly do harm to students should be suppressed. To agree to that would be to reinstate the "bad tendency" doctrine in First Amendment law, a doctrine we have done well over the years to have rejected. But in this case the speech itself was left unrestrained.[26] Nor was the speaker told to take a walk if he wished to exercise his constitutional rights -- the old perambulatory definition of academic freedom since happily overruled. The decision of the administration not to present charges against Professor Levin, though of course revocable as most decisions in life usually are, tells us that it did not flout the hard-won lesson that we must tolerate a good deal of audience discomfort for freedom's sake. But surely this does not mean that, once the

speech has been secured, the institution may not take cognizance of that audience discomfort and take steps to mitigate it. Only if one also holds that freedom of expression overwhelms every other value -- that the First Amendment exhausts all our concerns as professionals -- can such a position be sustained.

I have two short items to report and then I will be done. Item one: The City College appealed Judge Conboy's decision and the AAUP, joining with the New York Civil Liberties Union, fully supported the lower court's reasoning in an amicus brief that never brought into play the admonitions of the 1940 Statement. Sic transit gloria professionis? (The Court of Appeals for the Second Circuit agreed that Levin's First Amendment rights had been violated, but held that Levin was entitled only to declaratory, not injunctive, relief with regard to disciplinary proceedings.[27])

Item two: Leonard Jeffries was deposed as chairman of his department (though not stripped of his tenure) in the main because of his public statements, and he has threatened to sue. If I were his lawyer I would seek out Judge Conboy's court.[28]

ENDNOTES

1. J.S. Mill, On Liberty 53 (Alburey Castell ed., Crofts Classics 1947) (1859).

2. Id.

3. 391 U.S. 563, 88 S.Ct. 1731 (1968).

4. Id. at 572-73, 88 S.Ct. at 1737.

5. See Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983).

6. 391 U.S. at 570, 88 S.Ct. at 1736.

7. Kathryn D. Katz, The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth, 16 U.C. Davis L. Rev. 857, 858, 917, (1983).

8. Id. at 917.

9. See Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979).

10. Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).

11. Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).

12. 457 F.2d 289 (2d Cir. 1972).

13. 770 F. Supp. 895 (S.D.N.Y. 1991).

14. Id. at 899-905.

15. Id. at 907, 911.

16. Id. at 910.

17. Id. at 922.

18. Id. at 911.

19. Id. at 912.

20. Id. at 914.

21. Id. at 913.

22. Id. at 908.

23. Id. at 898.

24. Id. at 927.

25. Id.

26. Id.

27. Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992).

28. After this Article was written, Leonard Jeffries brought suit against City College officials, alleging a violation of his free speech rights. In May 1993, a federal jury awarded Jeffries $400,000 in damages. Judge Kenneth Conboy is currently considering whether to order Jeffries reinstated to his former position as chairman of the black studies department. See "Jury awards demoted prof $400,000," Chicago Tribune, May 19, 1993, at 10.

INDIVIDUAL AND COLLECTIVE RIGHTS IN THE ACADEMY

C. ACADEMIC FREEDOM: ARE THERE PERMISSIVE PARAMETERS TO FREE SPEECH IN THE ACADEMY?

Timothy Healy, President
New York Public Library

INTRODUCTION

When I discuss topics like freedom of speech as an absolute, I am really talking as a rudimentarily trained theologian rather than as a philosopher, lawyer or anything else. That leads me to say that free speech is no absolute and, thus, the answer to today's question is "yes" -- even under the ambiguity of "permissive" as a substitute for "permissible."

Absolutes admit of no exceptions, and there are circumstances, times and places where freedom of speech, even freedom of academic speech, is limited. The most important limit I can think of is the bind of confidentiality, either personal or professional. The professional limit is something we all accept; a lawyer may not talk about his client's business, a physician may not discuss a patient's illness, a confessor may not retell a penitent's sins. Personal restraints are perhaps more serious, since they correspond to a right that is absolute. Every man or woman must have someone he or she can talk to in confidence. Thus, a faculty member (or a college president) may not gossip about problems his students bring him.

My labor is what history and most of our dictionaries know as "casuistry." Let me give a definition not in most dictionaries. Casuistry is a process by which circumstance, setting and psychological state are allowed to temper the rigor of the law as it applies to any individual. In other works, it is a process that seeks to temper the wind to the shorn lamb, or in more modern terms, to get the accused "off the hook." Casuistry is also a method of teaching both moral reasoning and moral judgment. In the classroom we change its name but not its nature and call it, "the case method." Under that title old-fashioned Jesuit casuistry reigns supreme in the nation's best schools of law and business. The only law school I know (outside of Louisiana) that does not teach by the case method had Spiro Agnew as an alumnus.

Today I want to present to you three cases. All involve academic freedom of speech, each involves it differently, and

for each I, myself, was personally and intricately responsible. I had to come to judgment and did. Whether the judgments I arrived at were correct or not, I leave up to you. Obviously at the time I thought I was right in each instance. Looking back on them now, I am doubtful of the first, not prepared to die for the second, and still quite sure of the third.

One further pre-note. All the cases involved a Catholic University, although I hasten to add not one established by the Papacy or governed by Canon Law. I stress this, not because there is any particularly Catholic limit upon academic freedom that I or the university I headed would accept, but simply to indicate that nothing I did involved "state action." Whatever else I was or wasn't at Georgetown, I was not an officer of any government.

FREEDOM OF SPEECH FOR STUDENTS

My first case concerned student freedom of speech, and came out of the controversy on many campuses, including Georgetown, about divestiture of investments in South Africa.

I was a member of the Secretary of State's Advisory Committee on South Africa, and spent about fifteen days there working for that Committee. We managed ultimately to submit a report which began with the sentence "Constructive engagement has clearly failed..." and the Reagan administration got rid of it the day it appeared. Because of my work on that Committee I knew a lot of the players in South Africa personally, had spent time on the ground, and while I was hardly an expert, I was considerably more knowledgeable than most of the people sounding off around me.

I was personally in favor of some form of divestiture. Georgetown had a minuscule endowment, at that time roughly $200,000,000, and nothing we did would have much impact on the market. Jeane Kirkpatrick had told me that the only weapon America had was moral disapproval, but that it was a powerful weapon. I had been there, and concluded that Jeane was dead right. On the other hand, no president gets too far in front of his board of trustees, and I was proceeding with a deliberation the activist students found oppressive. The activist leaders were of the rant and rave variety and reason held little appeal for them. To jump ahead, about five months after the incident, the Board formally voted divestiture and a year later the University had accomplished it.

Before that happened, however, in the middle spring, activist students on the campus occupied the main entrance to a building and ensconced themselves under its arches. The admissions office screamed, since it was headquartered in that building, but the building had two other perfectly acceptable doors. Admissions felt that the sight of a bunch of activist students happily involved in a sit-in would turn off applicants. I answered that any applicants such a sight would deter would be too delicate grist for Georgetown's mill.

After some ten days in the doorway, the students constructed three shanties on the main lawn of the University. A bunch of them moved in and proceeded to set up cooking and other functions as though they were living full-time in these quarters. mercifully they decided to avail themselves of lavatories in adjacent buildings, so the University was spared having its lawn dug up for latrines.

The shanties begat a certain amount of rumbling on campus, since the whole issue found no unanimity among students. The rumbling got serious enough for the Dean of Students to worry that some attack would be made on the shanties, that it would probably be made at night, and that the youngsters in them stood a good chance of being hurt. The first time he brought me that reflection I followed the English model of "masterful inactivity." That Dean, however, was a serious and careful officer, as a matter of fact one of the University's best, so when he came back a second time I felt I should take his concern seriously. We asked the students to move and explained why. They refused and I consented to bring in the police. They came, removed the shanties, and arrested the students in them.

I was well aware that the shanties were a kind of symbolic speech, although permanent structures on a key part of the campus struck me as an extension of that speech beyond due bounds. That, however, was not what moved me. I was faced not so much with a question of public order as with a question of student safety about which the University not only can but must accept responsibility. I would have unhesitatingly called the police (or the National Guard or the Marine Corps) to protect the right of the faculty to teach. The Dean made much of his parallel argument that I had exactly the same obligation to protect students.

At the time I was not afraid of the consequences, but I wondered whether I was doing the right thing. The more I look back on it, the more I think I may have been wrong and that I should have waited them out. My doubts, however, hang on because of the immediate aftermath; when similar shanties on Johns Hopkins' campus were attacked and burned, four students were hurt, one of them very badly indeed. Had I waited three or four days, I might have had a better case, but even now I cannot be sure that I would not have had students hurt.

FREEDOM OF FACULTY TO SPEAK OUT

My second case involves the freedom of professors to speak out. When I arrived at Georgetown I found that I inherited a recently founded department of "Contemporary Arab Studies." Georgetown had taught Arabic for well over a hundred years, but this department was different in that it focused on current events in the Middle East. I was and am solidly pro-Israel, which I regard not as a prejudice, but as a conviction. I had the department vetted, by a team headed by Albert Hourani, the Professor of Arabic Studies at Oxford. Hourani had several advantages, beyond being a friend and an honest man. He is Roman Catholic and Lebanese, and so at least not an obvious partisan of either side. The vetting

came up positive. I was told it was a good department, an honorable department, that two of its people were outstanding, and that the program it offered was straightforward and unpolitical. The department always enrolled a goodly number of Jewish students and we had never had a complaint from any student that classes were biased.

Almost simultaneously, during my first three months on the job, I made a grotesque error. One of the schools at the University had traveled the Middle East seeking gifts, and received one from Muammar el-Qaddafi's Libya. It was a chair named in honor of Umar al-Mukhtar, a Libyan freedom-fighter who had battled the Italian occupiers until he was finally caught and executed. I was told at the time that el-Qaddafi was moving towards the West and that this chair was one maneuver in that approach. You have to remember that I came to Georgetown from CUNY, and at that time could not have located Libya on a map. Those of you who live and work in New York City know how completely its hyperactivity shuts out the rest of the world, and I was a superb example of a parochial New Yorker. So I accepted the gift. Needless to say, the source of the money was much criticized in the Washington Jewish community, and, indeed, raised many Catholic eyebrows. I was not, however, a complete fool, and Georgetown had sole, absolute and exclusive right over who was to fill the chair and how he or she was to be chosen.

After I had been at Georgetown for five years, I was having lunch with a trustee and he asked me a predictable question, "what is the best thing and the worst thing you have done over these five years?" I gave him one or two things that I thought I had done well, and then said that probably the greatest mistake I had made was in accepting the Libyan gift. His comment was direct and to the point; "Why not give the money back?" That shook me, but I thought about it for awhile and the idea struck me as a good one. I called up the Chairman of the Board and he said simply, "I wondered how long it would take you to come to that conclusion." I then consulted with a very wise man in the School of Foreign Service who told me that in returning the money I should stress my religious opposition to terrorism, and that I should return the gift in person to the Libyan Charge d'Affaires in Washington. I did both. Now the screams and yells came from within the University, one member of the department calling me in The Washington Post, "a Jesuit Zionist," a phrase that he felt carried a double reproach. I pointed out to all my Jewish friends that Jesuit Zionists were, indeed, the most dangerous kind.

The department and I had our ups and downs. One term they hired Maksoud, the former editor of El-Ahkram, and then discovered that he really was what he seemed to be, a propagandist. Quite properly they informed him at mid-year that his contract would not be renewed. The department made the mistake, but the department also corrected it. At the very end of his stay, late in May as I remember, he wanted to hold a press conference. The department properly told him that he could not have his press conference on campus, nor use the University's facilities to gather it. He hired a room at the Madison Hotel and held his press conference there. So

far, all was well. I discovered approximately 24 hours later that the University's public relations department had issued the releases on that press conference, liberally salted with long and highly tendentious quotes from Maksoud. On the spot I fired the Director of Public Relations, and spent the next three weeks apologizing for an error, but pointing out that it was not the fault of the academic department concerned.

That summer five members of the Contemporary Arab Studies Department went off on a junket to the Middle East visiting eleven countries. When they came back they presented their findings in a report to a Congressman, who put them in the Congressional Record. It was a private trip and a private report, but the Congressional Record is a commodious instrument. I can summarize the conclusions briefly: all troubles, difficulties, and hostilities in the Middle East would disappear if only Israel were to go away. Even my ignorance was capable of reading a most un-scholarly solution for what it was, and, needless to say, its publication in the Congressional Record begat a spate of letters and telephone calls. To all the callers, and in about a dozen letters, I pointed out that the five faculty members were, after all, citizens of the United States, had a right to their opinion, no matter how ill thought out and, indeed, had an equal right to petition Congress to listen to those opinions. The complainers mostly agreed with me, and I thought the matter had passed away, another in the series of flashpoints along the University's private Middle Eastern frontier. Then, to my surprise, when in the early fall I was shown the blueprints of the next alumni magazine, lo and behold, its centerpiece was the report of these five professors, this time with photographs, and a slightly expanded text.

It is perfectly clear that the University and nobody else is the publisher of its alumni magazine, essentially an instrument of the University's public relations. As soon as I saw the blueprints, I sent for the editor and instructed her that the article was to be removed. Needless to say this decision begat further screams from the Department of Contemporary Arab Studies.

Technically, because I was the publisher of the journal in question, I was within my rights. Looking back on it I can see that I could really have gone either way, but it seemed to me that the freedom of speech of the faculty did not extend to free dissemination in an alumni magazine. That was the case, that was my decision, and I am still willing to defend it.

OUTSIDE SPEAKERS ON CAMPUS

My last case concerns the freedom of other peoples' speech on a university campus. The Young Americans for Freedom, a group of hyperactive, adolescent New Gingriches, invited the Salvadorian leader, Roberto D'Aubuisson, to speak on campus. Here, too, I had more than passing knowledge of the terror for which he stood. I had been a friend of Archbishop Oscar Romero, lived in his house, eaten his food, and Georgetown had awarded him an honorary degree. When the

D'Aubuisson invitation crossed my desk, (and to this day) I was convinced that he was responsible for Romero's murder. On the other hand, the group was an accepted student gathering, and the invitation was by University rule theirs to make.

Predictably a good piece of the campus erupted. A close friend and professor of theology was the first one to have at me, and he was followed almost immediately by one of our younger stars from the history department, a young woman who was bright, able, and furious. Both implored me to cancel the talk. That same evening I said a Mass for students, and two law students, who had been part of our own program in Nicaragua, waited on me afterwards with the disarming, "Will you buy us a beer?" They, too, told me of their dismay, but at least with them I had the leisure to explain why I thought it was my job to keep the University's forum open. The next morning I was host at breakfast to six candidates for Rhodes scholarships. Since the purpose was to give them practice at handling controversial questions, I laid the case before them without indicating that I had made any decision. They divided evenly, three could stomach D'Aubuisson, not because they liked him, but because they wanted an open forum. The others disagreed and said that even open fora had their limits. On them I used the somewhat tougher arguments; that open discourse is seldom dangerous; that to intelligent and sensitive men and women, D'Aubuisson was an object of such repugnance that he would surely teach a lesson he had no intention of imparting. I also pointed out to them, this time with some exasperation, that if I were fool enough to rule out any one speaker, I could be read as approving of all others. With over a hundred student organizations and a whole faculty able to invite speakers, that was a pill I did not feel I could get down.

The next day brought some relief. The State Department refused Mr. D'Aubuisson a visa, so the matter became moot. There was one more moment, however, that I remember. After dinner, I was going back to my office, up a huge gloomy staircase. On the dark steps a senior whom I did not know stopped me to offer congratulations for my cancellation of D'Aubuisson's appearance. I told him that I had not cancelled and that I would not have. For twenty minutes we stood on the stairs and talked, my fatigue and experience wrestling with his sharp indignation and conviction. This time I was tired enough to pull the argument back to its roots: that the image and likeness of God in any man is first his intelligence and, second, his freedom; that free men have nothing to fear from the prating of tyrants; that, thanks be to God, the false usually illuminates the true. I wish I could say that I got through to this young man, but I no not think I did. I think he sensed the great ghost of Oscar Romero, and in kindness to my grief, he clamped down on his anger. Perhaps the only thing I communicated to him was my own confusion. My trade is teaching, and teaching takes place behind someone else's eyes. I have seldom in forty years of teaching felt my own failure so sharply.

As a matter of fact, some four months later, the State Department allowed D'Aubuisson to come, and he came to

Georgetown. In the interim I had published a piece in the Washington Post in which I called him "a murderous thug." He gave his speech and without incident. When he returned to El Salvador he was immediately assailed by the students of the State University who pointed out that an American university that was not afraid to insult him was also not afraid to let him speak. They protested successfully his own control over whom they could and could not invite to speak on their campus. At least that much good we accomplished.

Three moments, three cases, three puzzlements, all involved with freedom of speech. Each case came at a particular time with a precise set of circumstances. I did the best I knew how with each of them. All of them may have taught me only one thing, the lonely, austere wrench of Martin Luther's words, "Here I stand, because I can no other."

INDIVIDUAL AND COLLECTIVE RIGHTS IN THE ACADEMY

D. PEER REVIEW AND THE UNION: HERO OR HOSTAGE?

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Of all the issues related to faculty collective bargaining that have been debated over the past two decades, none has consumed more time, paper and energy than how, or whether, traditional governance mechanisms and collective bargaining can coexist. From early concerns about whether unions would destroy or diminish the power of faculty senates (Ladd and Lipset, 1975) to the Yeshiva litigation and its aftermath (Lee 1981; Lee and Begin 1983-84; Suntrup 1981), scholars and practitioners have found the interplay between the faculty's role as employees and their role as active participants in institutional policymaking to be fascinating and troubling.

Although the Supreme Court in Yeshiva found that peer review (among other faculty responsibilities) was incompatible with unionization, such has not been the case in the public sector. Attempts by the University of Pittsburgh, among other institutions, to apply Yeshiva to the public sector have been unsuccessful, and several recent enabling laws (in Ohio and California, for example), have explicitly included college and university faculty within the laws' coverage. Given the fiscal difficulties faced by institutions in both the public and private sector, it is unlikely that the next few years will witness a decline in unionization, particularly in the public sector. And an additional trend, the increased involvement of peers in faculty employment decisions, suggests that a shift in the focus of scholars and practitioners should occur.

PEER REVIEW AS A MANAGERIAL FUNCTION

To borrow a phrase from the Supreme Court's Yeshiva opinion, when faculty make a recommendation concerning whether a colleague should be promoted, tenured, reappointed, or discharged, they are performing a managerial function and are acting in management's behalf. Even if the faculty recommendation is not accepted, if it is considered seriously by the ultimate decision-maker, the faculty have performed a

managerial role. While scholars have criticized the Yeshiva decision for using the faculty's involvement in institutional policymaking to exclude them from bargaining (Begin and Lee 1987; Rabban 1989), the fact that such involvement of professionals is a managerial function cannot seriously be disputed (Rabban 1991).

Although peer review has routinely been a part of faculty employment decisions at most universities and four-year colleges for decades, peer evaluation is becoming more prevalent at two-year colleges as well. For example, the California legislature passed legislation that requires peer evaluation to be part of the promotion and tenure process, as well as part of any annual or periodic evaluations (AB 1725, CA Education Code, 1988). Greater faculty involvement in employment decisions at two-year colleges could pose problems for the union if the procedures are not developed carefully and if faculty, unused to such participation, are not trained in the appropriate criteria for evaluating peers, the potential legal pitfalls, and the importance of documentation.

Added to the spread of peer review to the two-year college sector is a series of trends that suggests that more peer evaluation decisions will face challenges, either in grievances or in court. State open records laws, and the recent ruling by the U.S. Supreme Court in EEOC v. University of Pennsylvania (1990), have increased the access of faculty to their peer review files. The amendments to Title VII of the Civil Rights Act of 1964 (Civil Rights Act of 1991) have made litigation more remunerative for plaintiffs and their lawyers, and the opportunity to try one's case before a jury will increase the odds of plaintiff success. The expansion of common law claims for wrongful discharge, and the willingness of the U.S. Supreme Court to permit unionized employees to seek judicial resolution of some wrongful discharge claims and bypass the grievance system (Lingle v. Norge, 1988) will also increase the proclivity of disappointed promotion- or tenure-seekers to turn to the courts for relief. Lastly, some commentators see a heightened judicial scrutiny of academic employment claims and a willingness on the part of some federal judges to evaluate the evidence themselves, rather than deferring to faculty committees or administrators (Brammer, Lallo and Ney, 1991).

These trends suggest that faculty peer review committees, or even individual peer reviewers, will be more vulnerable to claims of bias, procedural errors, defamation, or other complaints as faculty candidates seek to overturn a negative employment decision. On unionized campuses, the union represents both the grievant and the peer committee against whom the complaint may be lodged. Even on campuses where the complaint would be lodged against the department chair (if not in the unit) or against the dean (if the chair is a member of the bargaining unit), individual peer reviewers will be the actual targets of the grievance if the peer evaluators made the effective decision and the chair and/or dean merely endorsed their recommendation.

Since the union may be involved on both sides of a dispute between a candidate and the peer review committee,

union leaders must anticipate this problem and work to design the peer review system to clarify each individual or group's role. It is also clearly in the union's interest to make sure that faculty evaluators are trained so that they interpret evaluation criteria consistently, understand that they must apply them in an evenhanded manner, and document their recommendations thoroughly and appropriately.

The realities of the democratic nature of unions, as well as pressure from peers who may be outraged by a challenge to their recommendation or the allegation that they have behaved improperly, may tempt union officers to "count noses" and side with the peer review committee. The law of the union's duty of fair representation (Pyle 1989), however, ignores the fact that union officers are elected and cannot afford to antagonize many when they could antagonize one instead. This situation means that the union may end up on both sides of the dispute, held hostage by the parties and regarded as responsive to neither. It is clearly in the union leaders' interest to structure the evaluation process and support the peer reviewers to minimize the potential for conflict.

THE UNION AS GUARDIAN OF PEER REVIEW

The role that I am describing for the union is not as dictator, but as guardian of the peer review process. Research has suggested that peer evaluation systems that are controlled by union activists reduce the quality of personnel decisions (Rabban 1991, pp. 107, 109); it is not my intent to make such a suggestion. Rather, the union has a legitimate interest in both sides of the peer evaluation: protecting the candidate's right to fair and consistent treatment, and supporting the peer reviewers in the appropriate interpretation and application of the institution's evaluation criteria. The union's participation in several areas can improve the peer evaluation process and can encourage decisions that are fairly considered, well documented, and relatively easy to defend if challenged.

NEGOTIATING THE PROCESS

The process by which employment decisions are made is a mandatory subject of bargaining, so the union's participation at this stage should be noncontroversial. Although the various levels of review are usually clearly spelled out, it is often less clear just what performance standards a faculty member must meet. While it is probably inappropriate for the union to attempt to define on an institution-wide basis what "research" or "excellent teaching" or "high quality service" mean, the union should negotiate the process by which these terms will be interpreted by department, or discipline, or academic subunit. Even at an institution devoted primarily to teaching, appropriate teaching techniques may vary by the subject matter taught and the orientation of the students (i.e., college transfer vs. vocational). Clear and explicit performance standards are critical, not only for well-reasoned employment decisions, but to demonstrate the fairness and good faith of the decision if it is challenged (Lee, 1990). At

some institutions, a joint faculty/administrative group sets the overall performance standards, and then each department/discipl'ne/division interprets them explicitly for their own faculty, subject to the approval of that joint committee (or some other mechanism). this process can be incorporated into the collective bargaining agreement, but the substance of the performance standards should be developed separately for each academic unit.

If the unit's performance standards are approved by the joint committee or some high-level administrator, then higher review (whether faculty, administrative, or joint) of the application of those standards should be limited to whether the peer evaluators have sufficiently supported their determination with evidence that the candidate has or has not met the standards. This standard of higher level review can be incorporated into the collective bargaining agreement, but the actual performance standards should not be negotiated.

SUPPORT FOR PEER EVALUATORS

Developing explicit performance standards, applying them to a particular candidate, and then justifying the ultimate recommendation are not tasks for amateurs. A tenure decision is the most important decision that is made about a faculty member, both from that individual's perspective and the perspective of the institution that, by granting tenure, is usually making a commitment of lifetime employment. Delegating that decision to faculty colleagues without equipping them with the tools to make the decision fairly and defensibly disserves all three interested parties: the candidate, the peers, and the institution. yet few peer evaluators actually receive training on interpreting the institution's criteria, on potential legal pitfalls, or on how to document an employment recommendation. And given the fact that in small departments, promotion or tenure decisions may be made infrequently, many peer evaluators may never have participated in such a process.

The union can play an important support role in this context, either jointly with the administration or, if the administration cannot or will not devote the resources to training, on its own. First, union representatives can meet with the department and discuss the process of interpreting the institution's performance criteria for that particular discipline. What type of research is valued, and in what publication outlets? What does "service" mean to the department, and will merely showing up at a meeting suffice for "high quality service" or must the candidate demonstrate a real contribution to the committee's work? What are indicators of good teaching, and how will teaching be assessed? Will the department rely solely on student course evaluations, or will peers visit classes and observe teaching? How will syllabi be reviewed, if at all? Will student achievement be used to evaluate teaching? All of these issues should be determined before any particular evaluation is done (Lee, 1990).

An additional role for the union is training peer evaluators in how to apply the department's criteria to a

specific candidate, and in particular, how to document that criteria have been applied fairly and consistently. The use of "objective" measures such as the Social Science Citation Index, while imperfect, can buttress what may otherwise seem a completely subjective assessment of the impact of an individual's research. Using external experts to evaluate an individual's teaching, or even the syllabi, can improve the reliability (and the evident fairness) of the peer evaluation.

Sensitizing the peer evaluators to the potential legal consequences of certain actions is also a useful role for the union. The impact of what may appear to be inconsistent treatment of otherwise similar faculty is important to communicate to evaluators, as well as the effect of seemingly inconsequential racist, sexist, ageist, or homophobic comments during the evaluation process. Juries are particularly affected by such comments, and now that most employment lawsuits will be tried before a jury, tolerating such comments, even if they do not affect the outcome of the evaluation, is an invitation to litigation. Sensitizing peer evaluators to the need to assess carefully the relevance, accuracy, and propriety of each piece of evidence used to reach a final recommendation should enhance the fairness of such decisions and make them easier to defend, if that becomes necessary.

Another role for the union in this regard is making sure (perhaps by including language in the collective bargaining agreement) that the administration will represent and indemnify any peer evaluator accused of defamation, if that individual was acting properly and within the scope of his or her role as an evaluator. Much of the reluctance to be open about one's views of a peer's performance relates to potential legal liability (and the rest of the reluctance is the understandable wish to avoid alienating a colleague, a concern which no training will allay). Indemnification should remove one of the obstacles to effective peer evaluation.

A final role of the union should be helping the department think through what it should be doing for faculty, whether probationary or tenured. Mentoring, assistance with obtaining grants or help in improving teaching, regular feedback, networking, and other support can be built into the peer evaluation system, which will benefit faculty about whom decisions are made, and will provide peer evaluators with more information about the candidate's performance (Lee, 1990). Again the union should not assume the responsibility for these activities, but can identify models, and can help the department adapt these models or develop new ones. Each of the national higher education associations has staff that are trained to help local union officers address these issues.

PROSECUTING AND DEFENDING THE GRIEVANCE

Depending on how the grievance system and the bargaining unit are structured, the grievance may be against faculty peers or against one or more administrators. But the actual target of the grievance, no matter how the system is structured, will be the peer evaluation group if their

decision was negative and that recommendation was implemented by an administrator or higher level faculty group. The union must determine who is its "client" and how to walk the narrow line between alienating the peer evaluators on the one hand and incurring a duty of fair representation lawsuit on the other.

A. Grievances Against Administrators

Up front, the union must clarify, preferably in the contract, the permissible targets of a grievance. This will help, procedurally, but even if an administrator is the target of the grievance, the peer evaluators will be involved in the resolution of the grievance. Will the administration consider the peer evaluators to be "management representatives" for the purposes of the grievance and represent them, both at the grievance and later, if necessary, in court? If so, how much control will the peer evaluators have over the nature of their participation in these hearings? What type of assistance will the administration provide in preparing for the hearing, in meeting with the institution's attorney (if one is used), in collecting documentary evidence, or in preparing testimony? If a settlement is reached, what will be the role, if any, of peer evaluators, particularly if the settlement involves the candidate's return to the department that rejected him or her? All of these details should be worked out before the grievance is heard.

The above discussion assumes that the peer evaluation is unanimously negative, but in real life many decisions are split, and their may be a minority of peers who support the candidate. This poses even greater difficulties, since only a portion of the group will be "management representatives" and the rest will oppose their views. How will the administration deal with these individuals? Will they automatically be allied with the candidate (and thus represented by the union), or are they a third group that is left unrepresented and unassisted in the grievance and potential litigation?

B. Grievances Against Peers

At some institutions (the California State University system, for example), it is possible to file a grievance against a faculty peer. This situation is a potentially explosive one and the political consequences for union officers can be lethal. For this reason, it is especially important for the union to consider how it will handle such a situation should one arise.

If the candidate files a grievance against the peer evaluation committee (or the majority, if the vote was split), the union may have to represent both groups. This involves building a "Chinese wall," a procedure used by law firms when two members of the same firm represent clients with opposing legal interests. Under this system, union officers do not communicate with each other about the grievance or litigation, and each acts only in the interest of his or her "client." This process relies heavily on the integrity of the individuals involved and the level of trust between the

disputants and their union representatives. If all parties to the grievance are members of the bargaining unit, then any one of them is a potential plaintiff in a duty of fair representation lawsuit, so the quality of representation for all parties must be equivalent. If the grievance includes particularly complicated or difficult issues, the union could consider hiring lawyers for each side. Such a decision, however, is expensive and might be regretted later when subsequent grievances are filed for which the union cannot afford to hire outside counsel. Again, the interests of the minority peer evaluator group should not be ignored, nor should it be assumed that these individuals would necessarily side with the grievant nor wish to join his or her "side" of the dispute. It would be wise for the union to at least offer to represent this group separately as well.

C. Representation Tactics

Most experienced union leaders are accustomed to vigorously representing their clients against the administration. It is not unusual, nor is it inappropriate, to attempt to show the administrator or group of administrators in the worst possible light (and it often is not difficult to do so). In an adversary process, this tactic is expected and understood.

But customary adversary tactics may not be appropriate when the union is involved in a grievance against peers. Since all parties are members of the bargaining unit and must have confidence in union leadership if that leadership is to survive, attacks on witness credibility or truthfulness, vigorous attempts to impeach or otherwise discredit a peer evaluator, and other "normal" tactics may backfire. Representing the "client" effectively, whether that client be the grievant or the peer evaluators, requires discretion and tact, but not the sacrifice of effective advocacy. How does a union representative gently, politely, but clearly demonstrate that a peer evaluator applied inappropriate criteria, or that a candidate simply was not a good teacher? Such a situation demands skills that some union leaders may never have had the occasion to develop.

The union cannot expect the parties themselves to exercise the kind of statesmanship necessary in this situation -- it is the union's role. Maintaining a professional demeanor, helping the parties to depersonalize (to the extent possible) the situation, and focusing on issues of documentation and consistency rather than character or personality should help the scars heal faster, particularly in cases where the grievant will not be leaving the institution.

CONCLUSION

Research demonstrates that individuals are attracted to professional careers because they want control over their work (Blau, 1964). The continued emphasis on peer evaluation as an integral part of faculty employment decisions, and its spread to the two-year college sector, is evidence of this

continuing insistence upon involvement in the decisions that are important to faculty; the selection, evaluation, and retention of their colleagues. Although the evaluation of faculty and the decision whether to hire, promote, tenure, or discharge them is legally a managerial responsibility, faculty at a wide variety of institutions routinely participate in such decisions, and at many that participation constitutes the effective decision. Unions have a legitimate role as the guardian of the peer review process, and should help their faculty peers develop performance standards, apply them appropriately, and defend their recommendations if they are challenged. The union has the responsibility not only to ensure that the faculty has the right to play a role in employment decisions, but also to ensure that the faculty plays its role appropriately, defensibly, and lawfully.

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III. HIGHER EDUCATION COLLECTIVE BARGAINING IN THE TRENCHES

A. When Collective Bargaining Fails: An Academic Perspective

B. When Collective Bargaining Fails: A Management Perspective

C. Collective Bargaining is the Name of the Game

D. Dispute Resolution in Higher Education Collective Bargaining

E. The Employee Health Care Cost Crisis

HIGHER EDUCATION COLLECTIVE BARGAINING IN THE TRENCHES

A. WHEN COLLECTIVE BARGAINING FAILS: THE BOSTON UNIVERSITY, TEMPLE UNIVERSITY, UNIVERSITY OF BRIDGEPORT AND YESHIVA UNIVERSITY CASES

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The title for this session contains a questionable presumption: that collective bargaining failed at all four of the named universities. For purposes of our discussion I urge that we withhold judgment on that presumption until we have had a chance to learn as much as possible about the similarities and differences in the labor-management experiences of the institutions. As the session unfolds, we should seek a common understanding that will instruct further study and perhaps guide actions which contribute in positive ways to the conduct of union-management relationships in higher education in years to come.

There are three guiding beliefs which underlie my own evaluation of the experiences encountered by the four universities under consideration. It is useful, I think, to state those beliefs as a prelude to discussing the institutions themselves.

1. The right to withhold services (or strike) is a fundamental right of employees in our country, except where the strike represents real or probable danger to the life, safety or health of others. The occurrence of a strike does not, per se, indicate a failure in collective bargaining. In fact, it often contributes value to the process.

2. The existing labor laws in the United States, most particularly the National Labor Relations Act, were not designed to effectively govern situations where distinctions between employers and employees are unclear, such as those characterizing colleges and universities where faculty members contribute significantly to the managerial decision-making process on one hand and seek to exert power as members of a union on the other hand. The National Labor Relations Board and our Federal Courts have adopted a fiction about the nature of governance in higher education which has questionable relevance to reality in today's educational world.

3. I believe that joint decision-making and collective bargaining can, and must, co-exist in today's society. The experiences of colleges and universities in this regard do not stand alone. In fact, there are some 20 cases from outside higher education which are now pending before the National Labor Relations Board, all raising the issue of compatibility between shared decision-making and rights to be protected as employees under the National Labor Relations Act. Some of these cases will find their way to the courts, where this belief will be tested in a wide range of settings, thus paving the way, I hope, toward changing the labor laws and the ways they are interpreted.

In an attempt to set the stage for our discussions today I would like to highlight those aspects of collective bargaining in each of the four universities under consideration which I think are most relevant for our attention. In some ways the cases are related. In some important ways they differ.

YESHIVA UNIVERSITY

Yeshiva University never had a collective bargaining relationship with their faculty members. The lack of success by Yeshiva's faculty in its efforts to establish a relationship can be attributed to the fact that the faculty failed to tell the real story.

The record presented to the U.S. Supreme Court in the 1980 Yeshiva case did not inform the Court as to the reasons why Yeshiva's faculty sought to organize. Consequently a myth emerged, bearing only limited relationship to reality, and the myth led to a precedent-setting decision which remains as one of the most ill-informed in the history of labor relations in the U.S.

Here are some of the facts which were never placed on the record in Yeshiva:

1. Matters of salary, fringe benefits, leave policy, class hours and retirement were unilaterally determined by the Yeshiva administration.

2. So too, were decisions on the closing of a School (The Belfer Graduate School of Science) and the dismissal of tenured faculty members (for which Yeshiva was censured by the AAUP).

3. During the efforts to unionize, which extended for more than seven years, faculty salaries were frozen twice by the Yeshiva administration without any consultation.

4. During one of those freezes, in 1975, Sheldon Socol, the university's Vice President of Business Affairs, received a salary increase of $4,192, more than nine percent above his prior year's salary.

5. The working conditions for members of Yeshiva's faculty who sought to unionize were substandard. Crowded office facilities, excessive workloads, shortages of basic office equipment and absence of secretarial or staff assistance were common. Salaries were significantly lower than those paid to professors in comparable colleges and universities. One senior faculty member stated that the low salaries caused him to turn to "schlock" writing in order to earn enough money to live comfortably: this instead of scholarly research.

Counsel for Yeshiva University succeeded in convincing the courts that the Yeshiva University Faculty Association consisted of managerial and supervisory personnel -- that they "substantially and pervasively operated the enterprise." Consequently, according to counsel, faculty members were ineligible under the National Labor Relations Act to be included as employees in a bargaining unit.

The university placed a great deal of evidence before the National Labor Relations Board regarding faculty responsibilities, and that evidence was finally cited by the Supreme Court in upholding the university's arguments. For example, the university stated, correctly, that faculty members contributed substantially to academic decisions such as those involving curriculum, calendar, admissions, graduation requirements, testing and grading. The university also presented evidence of impact by the faculty on policy decisions, such as the location of schools. In addition, the university's counsel argued that while recommendations by faculty committees to grant or confirm tenure were technically subject to administrative veto, this authority was rarely exercised. These "facts," argued counsel, provided proof that faculty members were managers.

The union never countered these allegations with evidence of their own.

The Supreme Court, on a 5-4 decision, upheld the university. Writing for the majority, Mr. Justice Lewis Powell made it clear that if a complete factual record had been introduced, the decision might have been different. He wrote: "Yeshiva faculty members, on the record, in this case, were managers." Then Powell went on to state:

> There is no record to support the conclusion that faculty are not managers; the facts may be there, but evidence presented to the court says these people are managers.[1]

The Yeshiva decision was a surprise to many observers, including high-level administrators at Yeshiva itself, one of whom said:

> Of all the universities and colleges with faculty unions about which I have had knowledge the Yeshiva faculty was by far the least managerial.

According to this same official, who still holds a high-level position at Yeshiva, and with whom I visited a few weeks ago: "Nothing has changed in that regard."[2]

BOSTON UNIVERSITY

In 1975 Boston University (BU) was the fourth largest private university in the United States. In 1975 a bargaining unit consisting of 860 BU faculty members was certified by the NLRB. The parties then engaged in collective bargaining and finally agreed on a first contract in 1979.

Boston University had questioned inclusion of department chairpersons in the bargaining unit during NLRB hearings, and a case was taken by the university into the Federal Court System challenging that inclusion. This case was pending on the U.S. Supreme Court's docket at the time Yeshiva was slated for hearing. Since Yeshiva raised a larger question of whether faculty members, in general, are entitled to protection of the NLRA, the Supreme Court postponed action on the BU case -- pending the outcome of Yeshiva.

Soon after the February 1980 Yeshiva decision, the Boston University case was remanded by the Supreme Court to the Director of District 1 of the National Labor Relations Board (in Boston) for re-hearings on the entire bargaining unit "in light of Yeshiva."

Heeding the words of Mr. Justice Powell in the Yeshiva decision, the faculty union at BU (affiliated with AAUP) enlisted the services of one of the country's best-known and most highly admired law firms specializing in labor law matters, and the BU faculty union (guided by their lawyers) undertook a massive job in producing a complete record regarding functions of various faculty members in the proposed bargaining unit. Unit hearings began in January of 1981 and spanned 18 months -- ending in summer 1983. During that time, over 22,000 pages of testimony were accumulated, plus more than 1000 pages of exhibits. There were 157 hearing days, involving slightly over 100 witnesses.

Boston University negotiated a second contract with their faculty union in 1983. it was a three year agreement, which included a provision (Article XXV) stating that the contract would be binding unless final determination of the Boston University case on department chairpersons invalidated decertification of the entire faculty unit.

On June 29, 1984 NLRB Administrative Law Judge George McInery, delivered his opinion. McInery stated that the faculty were not members of a labor organization within the meaning of the National Labor Relations Act.

In October of 1986 the NLRB affirmed the McInery opinion, citing Yeshiva as precedent, and the BU faculty union was thereupon decertified. by 1984 the President of the United States had re-constituted the entire NLRB. None of the Board members who had upheld the efforts by Yeshiva's union on December 5, 1975 remained.

Considering Yeshiva and Boston University together, it is my opinion that unionization efforts at these two institutions did not represent failures of collective bargaining. Rather they pointed out the shortcomings of the National Labor Relations Act as it applies to union organizing drives and unit determinations. It also pointed out the need for changes in the Act in order to acknowledge obvious and dramatic changes in the U.S. workforce. In contrast to the 1930's, during which the NLRA was passed, we are now a service-oriented economy. Workers, by and large, are more highly skilled, better educated, and far more concerned about the increased need to participate actively in significant decisions that can affect the long-range well-being of the organization for which they work. Guided by experiences in other countries and by forward-looking corporations in the U.S., we have come to realize that the concepts of collective bargaining and shared decision-making are not necessarily incompatible. The National Labor Relations Act and its interpreters are out of date!

TEMPLE UNIVERSITY

Among the universities being considered here today, Temple University differs from the other three in at least two important respects. One, the Temple Association of University Professors (TAUP) represents faculty members at a public sector university and is protected in its collective bargaining relationship with the university by the Pennsylvania State Labor Relations Law. While the Pennsylvania law is similar in most respects to the National Labor Relations Act, including the right to strike, university professors have not been successfully challenged so far on a Yeshiva basis.[3]

The second major difference regarding the Temple case is that while there was a long strike by the faculty union, which started in September 1990, the strike was eventually settled, and the parties are continuing to relate to each other within a framework which assumes continuance of a collective bargaining relationship: albeit, the relationship was severely strained by circumstances related to the strike.

Many observers believe that the Temple situation represented a failure of collective bargaining, pointing to the fact that classes were disrupted, that enrollment dropped, that students were actively involved -- some in ways which led to arrests -- and that major tactical errors were made by representatives of the university and faculty association alike. There is evidence that negotiating errors were instrumental in prolonging the strike, serving to poison the university's image, causing students and teachers to depart and leading to loss of clout by the president.

Some of these errors were cited by journalists Huntly Collins and Lisa Ellis, who reported on the Temple strike in early 1991. They included the following:

1. The university implemented its last contract offer and sought to continue operating by

encouraging faculty members to cross picket lines to meet their classes. In a strong labor-oriented city, like Philadelphia, the administration should have anticipated that this action would increase the resolve to fight on behalf of the union. They should have anticipated that persons who would go to work would be perceived as having taken a bribe.

2. The university sought to reduce costs of health insurance by asking all faculty members to make a $260 yearly contribution to their coverage, but without apparent willingness to consider that such a proposal to be applied for each individual faculty member, did not take into account the fact that costs of coverage from one individual to another vary greatly, depending on factors such as age and size of family. Union members sought a dialogue on the subject without success.

3. The faculty association erred in making the university's president, Peter Liacouras, a focus of their demands, apparently not realizing that it is not possible to bargain for a "personality transplant."[4]

The Temple University case represents a failure of collective bargaining in pointing out that a strike, although permitted by law, sometimes harms persons and groups who are not directly involved in the negotiations, far more than it harms the negotiators. When one or the other side to a dispute knowingly hurts innocent bystanders while using them as pawns in support of selfish interests, this represents an abuse of the process. Tactical errors on the part of negotiators are understandable and forgivable. However, irresponsible misuse of a process which is designed to achieve mutual understanding by parties who share common objectives -- to help an institution grow and prosper -- is not forgivable.

THE UNIVERSITY OF BRIDGEPORT

The University of Bridgeport is a private institution which entered a collective bargaining relationship with its faculty union in 1973 under the aegis of the National Labor Relations Act.[5] The first collective agreement became effective in 1974, and the faculty association, which is affiliated with the American Association of University Professors, has remained certified since then. Relationships through the years have not been smooth, evidenced by the occurrence of four strikes during the past fourteen years, the most recent of which started on September 1, 1990 and is still, technically, active.

For more than twelve years the university, like many others in the country, has been faced by declining enrollments and rising costs, causing it to raise tuition, tighten budgets, lay off staff members and shut down programs.

In March of 1989, Bridgeport's president, Janet Greenwood, met with members of the university's faculty association to discuss the financial situation. The university had run a deficit for nine straight years, and Greenwood anticipated a shortfall for fiscal year 1988-89 which would exceed expectations by more that $500,000. She informed leaders of the association that members of the faculty would be asked to make financial concessions and that still more concessions would be needed to cover anticipated deficits for the following year.

Professor Alfred Gerteiny, president of the faculty association, thereupon sought opinions from the faculty association's executive committee and communicated them to Greenwood in a memo dated April 26, 1989. These included the following "tentative thoughts."

1. That 50% of the anticipated deficit should be contributed by all university personnel, including administrators;

2. That the total value of these contributions should be matched through a Board of Trustees grant;

3. That there would be "significant input" from the faculty association in institutional planning and budgetary priority setting;

4. That the existing collective bargaining agreement should be extended beyond its August 31, 1990 expiration, and that it should include an early retirement option along with salary increases equivalent to those in the existing contract for each of three years beyond 1990;

5. That no faculty reduction would take place for the next four years "unless mandated by a mutually agreed upon institutional plan or, for non-tenured faculty, by a justifiable non-reappointment recommendation through personnel procedures as prescribed in the collective bargaining agreement;"

6. That base salaries should remain intact except as they are affected by prescribed increases, and that TIAA-CREF contributions should remain constant.[6]

In short, the faculty association sought meaningful participation in any decisions which would call for concessions or reductions in force among members of the faculty. the administration responded in two important ways:

1. By suggesting that participation in decisions involving managerial responsibilities could result in a Yeshiva challenge and probable decertification of the faculty association;

2. By declaring a financial exigency and, in early 1990, announcing plans to eliminate fifty professorships (from a bargaining unit of 153). The university received a $12.7 million loan from eight local banks, and under terms of the loan the institution would be required to operate without a deficit in the next succeeding fiscal year and thereafter. In addition, the banks required a reduction of the existing budget by $3 million, to about $46 million.

Beyond the proposed elimination of fifty faculty positions, the administration said that in upcoming salary negotiations with the faculty association they would seek to cut salaries of the faculty members who remained by thirty percent. The collective bargaining agreement, which would expire on August 31, 1990, called for average faculty salaries of $46,000.

The then-existing collective agreement, which had an effective date of September 1, 1987, made reference (in Article 10) to the AAUP 1940 Statement of Principles on Academic Freedom and Tenure -- stating that no layoff of a tenured faculty member could take place except:

1. In accordance with the 1940 AAUP Statement; or

2. As a result of a decision by the administration, based upon its fair and objective assessment of institutional needs and financial conditions, to modify or reduce or eliminate one or more of its educational units...or educational programs.[7]

In a letter dated March 13, 1990, Jordan Kurland, Associate General Secretary of the National AAUP, informed President Greenwood that if the university issued notice to faculty members that their appointments would be terminated because of financial exigency, the members affected would be entitled to a full on-the-record adjudicative hearing before a faculty committee. According to Kurland such a hearing could include the following:

1. Requirement that the administration prove existence and extent of the alleged financial exigency;

2. The need for the administration to consider recommendations of a faculty body regarding validity of educational judgments for identification of faculty members for termination;

3. Authority of a faculty body to determine whether criteria were being properly applied.[8]

On Thursday, March 15, Alfred Gerteiny met with the chairman of the university's Board of Trustees, and the chairman gave Gerteiny reason to believe that he was receptive

to commencing discussions regarding Article 10 of the Collective Agreement. According to Gerteiny, four issues were discussed with the chairman:

1. The need for collegiality;

2. The need to find alternatives to faculty terminations;

3. The matter of notice and severance pay should terminations take place;

4. The need for a thorough study by the AAUP of the university's financial records.[9]

Leaders of the faculty association have since charged that no meaningful discussions on any of these matters took place at any time. Rather the university announced in negotiations for a new contract that they would go ahead with their announced plans to terminate faculty members and cut salaries. As a result, faculty association members walked off their jobs on September 1, 1990. So, too, did members of two other unions representing University of Bridgeport employees, one representing clerical workers and secretaries; the other representing maintenance and food service employees.

In addition to cutbacks and salary reductions, the university negotiators said that they would seek to implement changes in contract wording which dealt with matters of academic freedom and governance. For example, they sought contract wording which would specifically reserve all rights and prerogatives held by management prior to certification of the union. Specifically, the university identified the following rights and prerogatives:

1. To manage the university facilities and select and direct the workforce, both professional and non-professional;

2. To select and determine supervisory personnel;

3. To determine the extent to which the University shall be operated, including but not limited to the selection and scheduling of courses of study, academic disciplines and departments;

4. To relocate, continue or discontinue or increase or decrease any program, course of study, academic discipline, branch or department in whole or in part;

5. To close down the University in whole or in part;

6. To subcontract any or all of its operations;

7. To determine the size and scope of departments and programs;

8. To introduce new materials, procedures, methods, processes and equipment;

9. To determine and assign to employees, including bargaining unit members, their implementation and use;

10. To generally make and implement all decisions normally considered managerial.[10]

President Greenwood said the only alternative to the university's positions were to raise tuition by $3000 annually, for a total charge, including room and board, of $19,000. She said such an increase might be self-defeating, because it could lead to a decline in enrollment, which had already fallen from 9,100 in 1969 to less than 5000.

Prior to the start of the strike, the faculty offered to work under terms of the old contract for two additional years. The university rejected that offer.

Upon learning that the strike had begun, many students withheld tuition payments. All who had paid were eligible to request full refunds up until September 24. Some members of the faculty bargain unit were reported to have advised students to withdraw from the school -- to go elsewhere, stating that the likelihood of their obtaining a quality education at Bridgeport was not high.

By late November, both of the non-faculty unions which had gone on strike along with the faculty on September 1 had ended their strikes, and members had returned to work -- all taking four percent pay cuts. Among the 153 members of the faculty bargaining unit, nearly 100 were on the picket lines at the start. Of these, 32 returned to their jobs. Of the 68 who stayed out, only three were non-tenured. Fifty faculty members never went on strike. All who worked or returned to work accepted thirty percent cuts in wages and benefits, and non-union administrators took seven percent pay cuts.

Meanwhile, the university hired 39 professors and librarians to replace some of the strikers.

Faculty association leaders and a decreasing number of followers continued to picket and took their battles to court on behalf of the entire bargaining unit. They sought to compel the university to participate in arbitration over the issue of whether the so-called lay-offs were, in fact, dismissals. The association argued that the old contract governed the actions and sought to enforce Section 10 of that contract, most particularly the requirements that the university give one year's notice and one year's severance pay to those who were dismissed.

The faculty association also asked that liens be placed on the university's endowment and buildings. Bridgeport's endowment, which stood at $12 million in 1989 had shrunk to $9 million by November of 1990. Administrators had used some restricted endowment funds for expenses after obtaining permission from the donors.[11]

According to President Gerteiny of the faculty association, the association sought a lien in order to insure that the university had money to pay severance pay claims if ordered to do so by the court.

As the Bridgeport strike continued, fiscal woes deepened. On Monday, November 11, 1991, President Greenwood resigned, following a vote by the university's trustees to reject an offer from a group financed by the Unification Church to invest $50 million in the university and enroll 1000 students a year. Three days before Greenwood's resignation, Standard and Poor's had lowered the rating on $3 million worth of bonds for the university from BB to CCC, sending the message that the university was nearly out of cash and "there was a possibility that Bridgeport University may consider closing in the near future."[12]

Early this year (1992) the university's interim president, Edwin Eigel, announced that the University of Bridgeport had decided on a plan to have all of its programs, including its law school (which was not involved in the negotiation controversy described here) taken over by Sacred Heart University in Fairfield, Connecticut.

Meanwhile, the AAUP Chapter of the University of Bridgeport still exists and is carrying on battles in several arenas. In addition to court actions, the chapter filed three unfair labor practice charges. One charge alleged that the university failed to bargain in good faith in the 1990 negotiations. A second sought reinstatement of three tenured faculty members who wished to return to their jobs after having been replaced by part-timers. The third alleged that the university violated the law in its unwillingness to arbitrate regarding Section 10 requirements.

Upon receiving the three charges, the National Labor Relations Board questioned the possible applicability of the Yeshiva precedent. If the Board were to find that Yeshiva applied, the professors from Bridgeport would be unprotected as employees and ineligible to file unfair labor practice charges under the National Labor Relations Act.

The University of Bridgeport case, more than any of the others being considered by this body, represents a tragic failure of collective bargaining. It also provides a classic example of how one party to a collective bargaining agreement can effectively, and legally, use devices in the name of institutional survival which essentially could free it from obligations to bargain regarding pre-determined management actions. There is no requirement in law that managements seek involvement, participation or counsel from representatives of a faculty -- even where faculty members share common, overriding objectives with members of the administration.

Whether intended or not, the tactical devices used by the University of Bridgeport to cut costs in the face of a severe financial crisis effectively blocked members of the faculty association from providing meaningful input in helping to cope with that crisis.

From all evidence examined by me, it is clear that if the university intended to cut back on faculty positions and to do it quickly with the lowest cost to themselves in time, money or legal risk, they implemented a series of brilliant strategic moves.

1. They discussed the need for severe cuts in the context of collective bargaining for a successor contract, but, as far as I know, they made no cuts while the 1987-90 contract was still in force: thus, apparently freeing themselves from the obligation to comply with processes laid out in the contract to deal with cutbacks.

2. Their proposals to make cuts in salary were unilaterally implemented after expiration of the contract, probably with knowledge that an unfair labor practice charge would be filed against them, but comforted by the knowledge that, at worst, the charges would be upheld, but that punitive measures for having taken the actions were unlikely. (Although the law requires parties to bargain in good faith, nothing in the law requires them to agree!)

3. Changes in contract wording which, if implemented, would free management from obligations to comply with AAUP guidelines on academic freedom, tenure and financial exigency, were proposed with knowledge that they would almost certainly be rejected, thus causing some of the bargaining unit members to call for strike action -- action which could have been anticipated in light of the history of the relationship.

4. The university administration sought replacement faculty members soon after learning that some bargaining unit members failed to report to work. The administration would rightly feel secure in the knowledge that these replacements could become permanent.

5. At several junctures, the university made it clear that the Yeshiva case could be invoked in the event that the faculty association sought protection under the National Labor Relations Act by way of enforcement of their collective agreement or by filing unfair labor practice charges.

As a result of these tactics, the university may have succeeded in destroying the AAUP bargaining unit at the University of Bridgeport. Coincidentally, or perhaps as a result of the tactics, they have also witnessed the demise of a university.

SUMMARY

The history of collective bargaining in the United States is peppered with cases like the Bridgeport case. In recent

times we have seen instances -- Hormel Corporation in Minnesota, Greyhound Corporation and Eastern Airlines provide examples -- where cutbacks of work force and reductions in salary were accomplished (legally) through management tactics similar to those effected at Bridgeport.

Throughout the history of the United States, collective bargaining has worked far better in times of prosperity than in times of decline. However, there have been times when intelligent, caring parties, seeking involvement in complex problems which threaten survival of an organization have been ignored or cast aside by managements. our collective bargaining laws were designed to provide a forum for parties who share common interests to voice their opinions, to express their differences and to apply their creative energies for joint gains. The right to strike or lock out were sanctioned, not with the idea of destroying an organization, but rather to allow for exercise of economic power in an effort to share benefits from the relationship.

Unfortunately, our present labor laws are often interpreted these days in ways that discourage mature dialogue. Too often, they are interpreted as if unions and managements are adversaries, and as if disagreements must be resolved in ways that lead to victory for one and defeat for another -- and, in some cases, in destruction of the institution that the process was designed to nurture.

ENDNOTES

1. NLRB v. Yeshiva University, 100 S.Ct.856 (1980).

2. The Yeshiva University Faculty Association (YUFA) which conducted the union-organizing drive, represented only 209 faculty members (out of a total of more than 1200 faculty in the entire university).

3. A Yeshiva challenge was raised by the university of Pittsburgh when its faculty members sought to form a union. However, the challenge was rejected in 1990 by the Pennsylvania State Labor Relations Board, and the parties were directed to engage in representation election procedures.

4. See Huntly Collins and Lisa Ellis, "Can Temple be Saved?" The Philadelphia Inquirer Magazine, January 13, 1991, pp. 11-26.

5. 1973 was the year in which the Yeshiva University Faculty Association began organizing activities.

6. The Newsletter of the University of Bridgeport Chapter, AAUP, August 21, 1989, p. 2.

7. Collective Agreement between University of Bridgeport and University of Bridgeport Chapter, American Association of University Professors, September 1, 1987, Article 10, Section 10.1.

8. AAUP Update, document published by the University of Bridgeport Chapter, AAUP, dated March 19, 1990, p. 2.

9. Ibid, p. 1.

10. List of contract proposals, obtained from University of Bridgeport Chapter, AAUP, June 5, 1990.

11. The Chronicle of Higher Education, November 28, 1990, p. A-20.

12. The New York Times, November 13, 1991, p. B5.

HIGHER EDUCATION COLLECTIVE BARGAINING IN THE TRENCHES

B. WHEN COLLECTIVE BARGAINING FAILS: A MANAGEMENT PERSPECTIVE

Thomas M. Mannix
Associate Vice Chancellor
Employee Relations, SUNY

The invitation which I received to participate in this Twentieth Annual Conference of the National Center for the Study of College Bargaining in Higher Education and the Professions included a suggestion that there were four general topics which I might address: (1) a definition of the failure of collective bargaining; (2) whether decertification of an agent equates with bargaining failure; (3) whether institutional bankruptcy can be attributed to a failure of collective bargaining; and (4) whether failure of a union to achieve exclusive representation rights through the results of an election represents a failure of collective bargaining. Although I will address these four topics before I close, it might first be useful for me to share with you some of my biases at the outset so that you can understand my responses to those four suggestions.

Let me begin with an observation that I view collective bargaining as a tool or a weapon depending upon how it is used. From my perspective, it is a tool. Like all tools, it can be misused. It can rust, grow dull, work poorly or even break.

Before trying to define bargaining or the failure of bargaining, let us look at what bargaining does to a college when faculty organize. Bargaining draws lines in an organization between management and labor. Those are terms used to identify roles. I am aware that there are those who will argue that some managements do not manage or at least do not manage well, just as there are those who will say that there are people identified as labor who do not labor or who do not labor well. My purpose is not to argue the relative value or the relative quality of output by the two parties, but merely to acknowledge that without two parties, it is difficult to bargain. Bargaining unit lines in higher education are often arbitrary and do not represent any actual division of labor and responsibilities within a college or university. The lines are drawn nonetheless.

Colleges with organized faculty negotiate labor agreements. These contracts often delineate responsibilities, establish accountability mechanisms, identify and isolate decision-makers. Real deadlines are established and must be met. Procedures are developed which must be followed. Managers are expected not only to manage, but to do so according to rules the managers may find restrictive, may lack common sense in given situations, and rules which the managers have had little or no say in developing. The rules may be the direct opposite of what the managers asked for or would have asked for if anyone had contacted them. After all, an administrator's assignment should not be made too easy. For if our jobs become that easy, some people might conclude anyone could do what we do. As matters stand now in higher educational administration, only someone with a unique combination of talent, training and experience, or someone who is daft could do or would be interested in doing our jobs under some of the present circumstances.

Let me review some of the typical assumptions attributed to members of management about collective bargaining, especially when the process is new to a particular organization: (1) it is a high risk battle for control; (2) it is a negative chore forced on management by a small group of malcontents and troublemakers; (3) it is an action forced on an organization by outside agitators; (4) employee or union goals are in conflict with organizational goals; (5) bargaining is a test to see how little management can get by with giving away; (6) if management accepts a proposal it is seen as giving in, a sign of weakness; and (7) employee demands are usually unreasonable.

Faculty and academic staff, on the other hand, may assume bargaining is: (1) a logical process; (2) employee needs are a number one priority of the process at all times; (3) employees get control for a change; (4) a low risk operation because employees are in control of what will happen; (5) similarly, that strikes can be controlled because the employees are the union; (6) that bargaining ensures justice in the work site; and (7) important employee issues will get resolved in bargaining.

With the exception of the last employee assumption, I fear there is little or no accuracy to any of the other statements despite the fervor with which they may be held. For example, employees who believe that bargaining ensures justice are in the same boat with people who go to court seeking justice. As I understand our system, in court you may learn what a given law means to one or more judges or how it is to be interpreted and applied. Any given outcome, therefore, can be a far cry from someone's concept of justice. The arbitrator is not charged with dispensing justice. The arbitrator has the responsibility to interpret and apply a labor agreement. One does not have to read many arbitration awards to find comments about how an arbitrator is powerless to take a certain action because the language of the agreement is what controls the arbitrator's actions. Busy arbitrators divine the meaning of contract clauses and how they should be applied by deciding what the agreement says and means. They do not decide what the contract should say or might have said

in an award, although they may make references of that type in dicta.

Before being sensitized, I would have referred to those management and employee assumptions as "old wives' tales." Now, I refer to them as strongly held but inaccurate beliefs, myths, if you will.

Despite many discussions and arguments over the years, I still firmly believe that higher education management, even when facing an organized faculty, maintains the basic, overall responsibility to run the enterprise. In addition, management must honor its commitments, its labor agreements, and avoid encroaching on the rights of its employees and their labor organizations. Those organizational and employee rights are not always identical.

Unions are complex political, social and economic organizations. A definition I learned years ago still rings true. A union is a political agency operating in an economic environment. Unions, as organizations, have a central objective of survival and growth. Union leaders want to remain in office. Organizational and political goals can conflict with the needs and goals of rank and file union members, in our case, college employees.

Unions are not homogeneous in their membership or monolithic in their structures. Employee organizations are comprised of experienced and new workers, older and younger workers, male and female members, married and single members, specialists and generalists, active and passive members, liberal and conservative members, alienated and satisfied members, members with differing levels of talent, knowledge, skill and ability, not to mention racial, ethnic, and religious differences. The interests of this diverse group are not always in tune with one another. I never cease to be amazed at how these interests are served.

Fortunately, management does not have nay of these problems. Long ago, we learned how to find and train an elite corps of correct-thinking individuals who understand their functions completely. People who accept their responsibilities with enthusiasm so they may spend all of their working hours fruitfully pursuing the clearly stated goals of the college with nothing but cooperation and assistance from their fellow administrators and, most important of all, the ceaseless support, understanding and positive reinforcement from their president or chancellor and board of trustees. Now, those of you who accept that, after the program I would like to talk with you about some slightly damp land I know of in Florida and a nearby bridge.

Collective bargaining accelerates change. Colleges face change anyway. Bargaining merely increases the pace. Resistance to change exists in any organization but I sometimes think colleges have been able to raise resistance to change to an even higher art form that other organizations generally do. Change is often threatening. Because change is difficult to deal with does not justify falling back to the constant repetition of "We've never done it that way here" or

"We've always done it that way here" as the first and sometimes only responses to new ideas. Trying to bargain labor agreements which predict every conceivable situation which might arise during the life span of a labor agreement and developing a formula answer which absolves everyone from having to think or make decisions is another manifestation of the resistance to change phenomenon.

Methods and skills need to be developed where change can be accommodated without provoking excessive resistance and increasing employee and managerial insecurities. New insights into motivation need to be exercised. More ingenuity and creativity and less flexing of bureaucratic muscle is needed. I do not advocate change for the sake of change. I do advocate flexibility and the ability to respond effectively and efficiently to new situations.

New ideas need to be discussed. Old ideas need to be discussed anew. Ideas need to be addressed and judged on the basis of their content rather than their source. Listening skills need to be sharpened. Rhetoric needs to be downplayed or even eliminated. Development of a problem-solving attitude is required.

Except for the rare decertification, once a public college faculty organizes, it stays organized. Since bargaining appears to be here to stay, it is one of my responsibilities to try and make bargaining work to improve the day-to-day working relationship between college management and the faculty union.

One step in improving the bargaining process is to get everyone who is involved in bargaining to listen to what is being said. it has been my experience that too often the fight is over whether we should listen to something rather than what should be done, if anything, after listening has taken place.

It should not hurt to listen. At least three good things happen when you listen: (1) the person talking may only want to be heard and after talking the issue may fade away; (2) you may learn something useful while you are listening; and (3) the most obvious occurrence that I had to learn the hard way, while someone else is talking, if you are listening, then you cannot make a mistake. Mistakes occur when you are not listening or when you are talking.

The power relationship I hear so much about in bargaining should have nothing to do with whether one side or the other listens. Good ideas should be followed up. Poor ideas should be discarded. Possible solutions should be tried, and if they work, continued. If they do not work, other solutions should be sought and implemented. if we only do what we know will work, we are moving too slowly to adapt to our changing environments.

The name of the bargaining game is agreement. Sometimes one of the parties thinks agreement is spelled concession. Sometimes one of the parties thinks agreement is spelled capitulation. Those pitfalls should be avoided. Trying to

develop a problem-solving approach in a hostile situation with a high degree of mistrust present, is challenging to say the least. Searching for an approach which allows the college to accommodate to the needs of collective bargaining without interfering with the primary missions of education, research and community service is my idea of a perfect raison d'etre.

Each time there is a discussion of an issue, either party has a response continuum available that ranges from no change in the status quo sometimes shortened to "no!" at one end to complete acceptance of the idea under discussion at the other. There are times when "No" is an appropriate response. A party with a reputation of being willing to meet and listen may be able to say "No" once in a while. How you say "No", of course, is an important consideration. A history of cooperation, whenever possible, reasoned discussions, and full consideration of all proposals being discussed before a negative answer is given may help. Although I know that cautious rather than caustic rejections usually work best; there are people here today who know I do not always act that way.

Since the name of our game is agreement, colleges which attempt to focus on the decision-making process as well a its outcomes and which demonstrate a sensitivity in the handling of personnel issues are likely to show the greatest progress toward accommodation.

Effective progress toward accommodation is found where the free exchange of information is encouraged. Information is viewed as neutral. Facts or the truth, whatever that is, is as bad as it ever gets. Blame-seeking and self-protective approaches are eliminated or at least not tried very often. Appeals to enlightened self-interest are the rule. Formal, informal and ad hoc interactions occur. Parties show a high degree of internal cohesion and cooperation is viewed as a desired outcome.

Now, to the four topics. In reverse order of their presentation to me: (1) If a union fails to win exclusive representation rights through an election, does that represent a failure of collective bargaining? No. (2) Can an institutional bankruptcy be attributed to a failure of collective bargaining? I suppose it could. We have very little experience with the closing of campuses. The 1991 Center Directory found ten campus closings, nine private and one public, since 1976 involving about 400 faculty. I know of no study which has looked at any of those closings carefully. I seriously doubt if collective bargaining was a major factor in any of those closings. (3) If a bargaining agent is decertified, is that a failure of collective bargaining? No. The process allows for decertification, therefore, when it occurs, it should not be viewed as a failure of the process. (4) Do I have a definition of collective bargaining failure? No, I do not.

Perhaps, should I teach a course in bargaining or dispute settlement techniques, I will develop one. Not reaching a contract may be viewed as a failure by some, especially since agreement is the name of our game. Is reaching a weak, poor

or bad contract a better outcome than not reaching an agreement? I do not think so. Are strikes indications of a bargaining failure? No. Strikes are part of the collective bargaining process. They may be illegal activities in certain public jurisdictions, but a strike is not a failure of the bargaining process, per se. If strikes occur regularly within a relationship, the tool may be being misused, but the process is not at fault. You may find a situation in which employees feel they accomplished so much more by striking one time that they are unwilling to settle for anything until they have struck each time to assure themselves they have wrung the last ounce out of the management offer. That is not a failure of the bargaining process. People using the bargaining process may have failed in that instance. On the other hand, if an action is viewed as a management failure, that same occurrence may be viewed as a union's success. In either case, the process may be working.

Management may have instructions to keep the college unorganized or to decertify an existing agent. If those are management's instructions and that management is successful in using the collective bargaining process to achieve its aim, that is not a failure of the process. It is an outcome that someone else does not like.

Good human or employee relations is always good labor relations. Unions consist of individual employees hired, trained, promoted, compensated, given permanent appointments, and disciplined by management. As management gets the kind of employees it deserves, management also gets the labor relations it has earned.

A particular union or a particular union leader can make my job relatively easier or harder, but my basic responsibilities remain unchanged. What does change is the possibility of and the effort needed for success.

HIGHER EDUCATION COLLECTIVE BARGAINING IN THE TRENCHES

C. COLLECTIVE BARGAINING IS THE NAME OF THE GAME

David Newton, Vice Provost
Faculty and Staff Relations
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Twenty years ago a handful of college administrators gathered together in an inn on Cape Cod to discuss a relatively new phenomenon which had appeared on the horizon of higher education -- faculty unionism. We came, primarily, from campuses in the northeast -- New York, New Jersey, Pennsylvania -- and from Michigan in the midwest -- areas where the sudden spurt of permissive state public employment legislation, beginning in 1965, provided legally enabling and protective ability for faculty unions to organize in post-secondary educational institutions. Our respective campuses were either in the process of being unionized or had just been unionized or were in the process of negotiating their first contract. The term "collective bargaining" was not readily found in the lexicon of academe in those days, and faculty unionism was largely an anathema to the academic profession.

General views expressed at that meeting ranged from open hostility to reluctant acceptance of faculty unionism as a bad idea whose time had come. Concerns were raised about the impact of collective bargaining on the traditional collegiate structure of colleges and universities and the nature of the teaching profession. Some states (Massachusetts in particular) prohibited bargaining over wages and salaries, and left only governance items open to negotiation. There was even some talk of having students involved in the collective bargaining process.

Some prophets of doom-and-despair went so far as to suggest that the advent of collective bargaining, which would undoubtedly engulf all of higher education, marked the beginning of the end of the university as we knew it. Scholars who were essentially citizens of a meritocracy would find little comfort in the egalitarian press of collective bargaining. The professors would surely become nothing more than "lumpen proletariat."

In those days I shared the view of those realistic proponents of faculty unionism who thought that collective bargaining was here to stay and who did not flinch at

admitting the inherent adversarial relationship of collective bargaining. Nor have I changed my mind during the past twenty years. In fact, I am about to share with you some remarks I prepared for that first meeting which I believe to be as pertinent today:

> Because it is so obvious, I think we sometimes overlook the simple fact that faculty, like other human beings, need food, clothing and shelter. Like other employees, they want to be compensated: Satisfied with and protected in their jobs. I have come to the conclusion that faculty in higher education join unions for the same reasons that steelworkers, bus drivers, firemen and white collar workers do -- to get better wages, job security and improved conditions of work. Unlike other employees, however, faculty also view themselves as professionals with historic involvement in establishing both the standards and the controls over their conduct as professionals. It would be fatuous for me or for anyone else, to assert that every vote for a union is an act of professional defection. Still, whatever their intentions, faculty do make choices. When they freely elect a bargaining agent, they choose a new form of representation -- one that contrasts sharply with the historic concept of the Universitas Studorium and collegiality. When a faculty accepts a union, they choose to endorse not just an agent, but a process -- a process that requires them to relinquish certain professional characteristics and to compromise if not abandon the concept of collegiality.
>
> If nought else, I have learned that collective bargaining has as much in common with collegiality as cheese has with chalk. For those of you who wince at this judgment, let me point out that by the very act of electing a bargaining agent, a faculty gives up its right to self-determined colleagueship. They concede to an external agency -- The National Labor Relations Board in the private sector, and the State Public Employment Relations Board in the public sector -- the right to determine what constitutes common interests and who shall and who shall not be included in a given faculty collective bargaining unit. Let me also point out that both the National Labor Relations Act and the various state labor laws were designed to give the American worker some basic and protected rights. They were not designed with a view towards protecting, let alone enhancing, "a community of scholars." The law conceptualizes in two distinct parties -- "management" and "labor" and envisions negotiations between those two entities predicated upon an adversary relationship. That process is inimical to collegiality with its management mix of professor-administrator and admixture of faculty and administration sitting in councils of academic governance. Abhorrent as it

may be to the self-image of the professorate, the process itself engenders a view of professors as employees -- hired by bosses. In short, where a faculty has exercised their legal right and has opted for unionism, the name of the game is collective bargaining -- not collegiality.

Those of us, myself included, who have been forced by the advent of faculty unionism to become S.O.B.s, that is, members of the "Society of Bargainers," have long learned to accept and live with the fact of collective bargaining in higher education. We have, during the past two decades, turned our attention and energies towards understanding its form and art. As with learning any new game, the lessons tend to be both arduous and costly -- sometimes even crippling. But my assignment this morning is to share with you -- at minimal cost -- some of the lessons I have learned. For whatever they are worth, here they are:

LESSON ONE

A union is a union is a union, regardless of whether it marches under the banner of AFT, NEA, AAUP or a local non-affiliated group. A union is inherently a political and economic organization. it is not an educational association. Its actions and decisions are primarily, if not exclusively, based upon the perceived needs of entire categories of employees without regard to individual differential in academic achievement or professional excellence. Its strength is based upon the principle of egalitarianism and the extent of its group solidarity.

LESSON TWO

Collective bargaining is collective bargaining is collective bargaining -- regardless of whether it takes place in an industrial or an academic setting -- whether in the private sector or in the public sector. Academics tend to flinch at the term "industrial-style labor relations." In fact, the term has been used as a bugaboo with which to shock trustees and shame administrators. But in reality there is no difference between "industrial-style union negotiations" and "faculty-union negotiations" -- or such little difference as to be inconsequential.

Anyone who knows about the history of the American Labor Movement recognizes that there are as many different collective bargaining styles as there are industries and unions. Assuredly, the bargaining act and the contracts bargained do vary with the cast of characters involved as principles on each side of the bargaining table. But the rules of the bargaining game call for the parties to adopt an adversary stance, and each time that the game is played, it develops its own logic and momentum, regardless of the setting.

One thing is certain, following an election and certification of a collective bargaining agent, the

institutional management, like the groom at a shotgun wedding, must accept the inevitability of a new legal relationship, regardless of how it got there. From that point on, management structure must respond by adaptation, modification or change to the requirements of a repetitive three stage collective bargaining life cycle:

1. Preparation of negotiations

2. Contract negotiation

3. Contract administration

From contract period to contract period, this cycle is inexorably repeated. Each stage, of course, makes its own demands upon both the structure and cost of management.

LESSON THREE

Management deserves the contract it signs. If during the course of bargaining the administration has buttressed its good faith approach to negotiations with facts and figures to support well-reasoned positions: if its representatives have been skillful in the art of negotiating a contract; if the institutional trustees and administrative officers understand and are prepared to accept the fact that in collective bargaining some issues cannot be resolved without taking a strike, the chances are that a reasonable contract will emerge.

On the other hand, if management has been sloppy, unprepared or lacking in understanding and skill regarding the collective bargaining process, it may find itself saddled with a costly contract that is incapable of properly administering, and one that is both damaging to the educational process and to the institutional character.

LESSON FOUR

In bargaining do not underestimate your ability to rise above principle. A union bargaining team legally represents the faculty unit, but rarely is it representative of the faculty as a whole. The union team usually consists of the stronger proponents of collective bargaining within a given faculty. The politically able activists are more likely to appear at the bargaining table than the professionally eminent faculty. Regardless of who or what they are, however, the union's leadership depends on continued support of its constituency; consequently the process tends to encourage essentially political rather than essentially academic decision-making. In order to strike a bargain or to avoid a strike, the parties occasionally may have to reach new heights of political expediency and learn to rise above principle.

LESSON FIVE

In the land of the blind, a one-eyed lawyer is better than none. A realistic assessment of contract negotiations must include the possibility of exhausting all of the procedures available to the parties under the law, namely,

direct negotiations across the table, impasse procedures, including mediation, arbitration and fact-finding and, finally, a legal or even an illegal strike. God may look kindly upon those of us who engage in legal battle armed only with righteousness and moral persuasion -- but the National Labor Relations Board, the arbitrators, and the courts are not so kindly disposed. The legal complexities for collective bargaining, from unit determination through arbitration, require the expertise and experience of a specialized modern day mercenary -- the labor lawyer. Hire one -- preferably one with two sharp eyes.

LESSON SIX

Strike is not a dirty word. The law governing collective bargaining requires "an employer and the representative of its employees to meet...and confer in good faith with respect to wages, hours and other terms and conditions of employment." These obligations are imposed equally on each party -- but the law does not compel either party to agree to a proposal by the other, nor does it require either party to make a concession to the other. The lawmakers in their wisdom have recognized that in the course of human events, reason, truth and logic do not always prevail, and have sanctioned the use of a weapon designed to break any deadlock or impasse that blocks agreement, of course, once again equally imposed: the union has the right to strike and the institution has the right to take a strike.

A restraining influence on the use of a strike has been a recognition by both parties that the consequences may be injurious to students, coercive to non-juring co-professionals and other staff employees, and crippling to the institution. When an impasse is reached, however, the union usually resorts to raising the "pressure level" of the negotiations. Press conferences are held, trustees or local boards are bombarded with letters, phone calls and telegrams. In the public sector, it is not unusual for the union to try to get from "city hall" or the "state house" what it cannot get at the bargaining table. Mediators and fact finders may be called in. When all else fails, the union may resort to strike, and management better not find itself in the position of a mouse with only one hole who is easily taken. The only thing dirty about a strike is losing it.

LESSON SEVEN

In collective bargaining legalities outweigh civilities. Collective bargaining has little tolerance for sloppy, weak or fragmented management. In academic institutions, lines of authority, responsibility and supervision are often blurred or nonexistent. But effective management under a labor agreement and trouble-free administration of that agreement require contract-wise administrators and well-trained supervisors. The academic setting tends somewhat to make us all prisoners of courtesy, and academic administrators are prone to doing things the "nice way." In contract negotiation and contract administration, however, it is far more important to be right than nice. The "nice way" is predictably the sure way to legal trouble. In the collective bargaining marathon,

the administration that is direct, consistent, fair and contractually correct not only finished first but lasts."

These remarks were made twenty years ago. The only thing I would add is to note the impressive union gains over the past two decades. As of this date there are 476 faculty union contracts covering some 222,859 faculty and non-teaching professions.

These are striking figures given the fact that collective bargaining in higher education has been a measurable reality only since the late 1960's and early 1970's. In 1968, perhaps 10,000 faculty members were estimated to be under the aegis of some level of collective bargaining status, the overwhelming majority of which were faculty members in community or junior colleges or vocational institutions. Despite the remarkable growth of faculty unions over these past two decades, most of higher education is still not organized. Less than 30 percent of the approximately 3500 institutions of higher education in the United States are unionized; four giant systems in New York, Florida and California account for approximately 40 percent of the national total. There has also been a noticeable slow-down of newly organized campuses; in 1990 there were only three new contracts and only six the past year.

The significance of these trends is, however, far less important than the fact that both higher education and faculty unions are very much alive and kicking, despite economic hard times. Twenty years ago there was a question as to whether higher education would ride the wave of collective bargaining or whether it would be engulfed by it. It is apparent that faculty unionism has not destroyed the academy -- in some instances it has even strengthened institutions of higher education. What is eminently clear after all these years is that collective bargaining, as a force for good or ill in academe, is what its practitioners and their respective constituencies want it to be.

HIGHER EDUCATION COLLECTIVE BARGAINING IN THE TRENCHES

D. DISPUTE RESOLUTION IN HIGHER EDUCATION COLLECTIVE BARGAINING

Norman G. Swenson, President
Cook County College Teachers Union

Although I have advocated "limited negotiations," a close relative of "win-win" or "positive" negotiations, I would never want to give up the right to strike. I led the fight for the right of teachers to strike in Illinois. I was jailed twice for my beliefs. In 1971, I served 30 days in the Cook County Jail for a strike I led against the City Colleges of Chicago Board in 1966. In 1975, I served two weeks of a five-month sentence for a strike I led against the City Colleges Board in 1975.

Because of these and five other strikes I led in the City Colleges, our members enjoy a 12-hour teaching load, a 1:1 lab-lecture ratio, contractual class size limits, an average base salary of $50,000 and a fully paid health insurance policy. Altogether, our local Union which represents employees in 13 separate community college bargaining units in Chicago and the suburbs, has called 19 strikes in our 27 year history. Our Union blazed the trail conducting the first successful strikes by public employees in the Chicago metropolitan area.

Our Illinois Educational Employee Labor Relations Act is a direct result of our membership's willingness to strike and my willingness to go to jail for my beliefs. When we planned our first strike in 1966, there was no collective bargaining law for teachers. Moreover, we did not want a collective bargaining law unless it was accompanied by the right to strike. Like Al Shanker, who led the first teachers strike in New York, we believed in organizing and gaining collective bargaining through a strike. In Illinois, our state affiliate grew by 58,000 members to 70,000 members today by using the strike as an organizing tool. Our competition, the Illinois Education Association and the AAUP, lost many of the members we gained. They favored a collective bargaining law with binding arbitration of contract disputes and mandatory agency shop provisions as a way of locking in their members. Because we demanded that our collective bargaining law include the right to strike, we did not get a law until 1984. We are now one of only four states in the U.S. allowing teachers strikes.

The others are Pennsylvania, Minnesota and California. In twenty states where teachers strikes are illegal, teachers and their unions are punished by fines, jailings, loss of dues checkoff and/or loss of bargaining rights.

In such states, some form of binding arbitration is usually required. When times were good, binding arbitration meant good settlements because the money was there. Today in many states with binding arbitration, years may pass without a contract settlement. When there are settlements under binding arbitration, they often involve takeaways and salary freezes. You have only to look at the private sector to learn what happens to unions without the right to organize, the right to collective bargaining and the right to strike. The Yeshiva decision has killed the right to organize, the right to bargain and the right to strike at private colleges. The Reagan-Bush Supreme Court decisions, the PATCO strike and the failure to pass a law prohibiting striker "replacements" have demolished the notion that U.S. government workers or workers in the private sector can strike and keep their jobs. This message has been amply demonstrated in many recent strikes such as Greyhound, Eastern Airlines, Chicago Tribune, Phelps Dodge and the National Football League. Tom Geoghegan in his book, Which Side Are You On, traces the decline of the American labor movement to the loss of the right to strike, the right to organize and the right to collective bargaining.

So what does all this mean for collective bargaining in higher education? It means that we should try new non-confrontational models such as "win-win," "limited negotiations," "positive negotiations," and other ersatz substitutes for positional, hard-nosed bargaining. But in the real world of Baron Von Clausewitz, Che Guevera and management lawyers who advocate a "union free" environment, we must also be prepared to practice the "Real Politic," power politics of Hans Morgenthau and other realists. We must demand the natural right to strike if gentle persuasion fails. As von Clausewitz said in On War, wars are only the continuation of politics by other means. Similarly, strikes are only the continuation of negotiations by other means.

I believe this natural right should be secured by law if possible. But I was also an early reader of Henry David Thoreau's essay on civil disobedience. His essay inspired Ghandi, Martin Luther King and Lech Welesa. They based their non-violent revolutions on Thoreau's teachings. Thoreau said we can achieve social change by the non-violent repudiation of unjust, authoritarian laws. John Stewart Mill, John Locke and the U.S. Declaration of Independence echo similar themes.

But if we violate the law, we must also be willing to suffer the consequences. Ghandi, King and Welesa were prepared to go to jail to gain liberty for their people. Socrates was prepared to die for his beliefs. More than 150 members of the United Mineworkers Union were jailed and their Union was fined over $5 million in their struggle to win the Pittston strike.

This spring I am negotiating three faculty contracts while my assistant is negotiating three classified contracts.

We are making every effort to avoid strikes. But if we are forced to impasse and cannot accept the Board's final offer, we will, like Oliver Cromwell, John Locke and other defenders of liberty, assert our right to withhold our services. And in Illinois we can strike without risking the loss of our jobs, fines and imprisonments. Nor will our union lose dues checkoff, be fined or forfeit the right to collective bargaining. I call the right to organize, bargain and strike without the fear of reprisals "free" collective bargaining and I believe every American should have that right.

I also believe we should be collegial and cooperative in our relationships with management. I believe we should engage in non-confrontational bargaining and resolve our differences before we reach impasse. That requires honesty, good faith and a tremendous effort on both sides. As Teddy Roosevelt said: "Speak softly, but remember to carry a big stick."

HIGHER EDUCATION COLLECTIVE BARGAINING IN THE TRENCHES

E. THE EMPLOYEE HEALTH CARE COST CRISIS

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To set the stage for this presentation, I think we should explore some background to understand how we got to where we are today. There has been an inexorable increase in health care spending in the United States. In 1960, about 5.8 percent of the gross national product (GNP) was spent on health care. By 1990, 30 years later, more than twice that figure, approximately 12.4 percent, is being spent. At the present rate, health care costs will average between 15 percent and 17 percent of the GNP by the year 2000.

What health care expenditures represent as a percent of corporate profits, is even more unnerving. In the 1960's, corporations spent about 7 percent of corporate profits for health benefits. Health benefits were relatively inexpensive, popular with employees, and enjoyed preferred tax treatment. By 1990, however, nearly 50 percent of corporate profits were going for health benefits, and the slope of the curve is up.

This development is not helping the U.S. compete in an increasing global economy and it is eroding the financial viability of purely domestic enterprises of all types. Comparing per capita health services expenditures nationally with other developed countries, and also as a percent of the GNP represented by that expenditure, the U.S. holds the dubious distinction of being the world leader.

Where does that health care dollar come from and how is it spent? The sources of money spent on health care: 33 percent private insurance; 17 percent Medicare; 10 percent Medicaid; 15 percent other government programs; 21 percent out-of-pocket sources (a growing area); and, approximately 4 percent other private sources (including dwindling philanthropy).

How is the health care dollar spent? Compared with ten years ago, some important differences can be identified. Hospital care, still the largest single expenditure, accounts for $.38 of the health care dollar. A few years ago it was $.42 to $.43. Hospital utilization has definitely responded

to certain cost containment programs which have swept the country over the past seven years, including pre-admission review, concurrent review, and catastrophic case management.

Expenditures on nursing home care are down about 12 percent to $.08 from ten years ago. Drug, equipment, and home health care expenditures are up to approximately 10 percent. Also, expenditures for physicians and dentists have remained relatively stable at 19 to 20 percent.

The amount we spend on health care makes it clear that Americans place a high value on it. In a recent survey by the employee benefits research institute and gallup pollsters, 61 percent of employees picked health coverage as the single most important element of their benefits package.

Another survey reveals that employee satisfaction with benefits has dropped dramatically during the past six years. In 1984, 88 percent of employees rated their benefits "good" or "very good." By 1990, only 42 percent of employees rated their benefits as highly. This may reflect employers' efforts to contain health care costs by shifting some of the burden to employees and by instituting cost containment programs. Also, as people select a new physician because of significant financial incentives, long-standing doctor-patient relationships can be disrupted.

A drop in benefits satisfaction also parallels a significant drop in employee morale. This may be influenced by the general insecurity associated with the recession and its large loss of jobs.

If there is any good news, it may be that this near panic, created by the rate of increase in health care costs, has generated a considerable amount of good old-fashioned Yankee ingenuity. The developments of the last decade are breathtaking in terms of the way medicine is currently practiced, financed, organized, and perceived. As part of this revolution, a number of effective cost containment techniques have been developed.

For example, implementation of a well-run pre-admission review program for hospital admissions can save an organization 5 percent to 14 percent of their hospital expenses. That is done without any compromise in quality of care.

Managed care in the form of HMO's, preferred provider organizations (PPO's) and other such arrangements actually work. Annual premium increases for HMO's over the past several years have been approximately five percentage points lower that those for traditional indemnity insurance products.

When one analyzes what drives increases in health care costs in this country, 40 percent can be attributable to medical inflation, i.e., basically price increases. Payers are becoming increasingly sophisticated at negotiating better prices with health care providers of all types. There is no question we will see more price limitations from public payers, who can build such limitations into laws and regulations.

In summary, we have a very complex set of problems associated with health care financing and delivery in this nation. Successful solutions must be at least as complex.

Effective cost containment on the part of public payers has induced hospitals specifically, and providers generally, to look elsewhere to make up their financial shortfalls. That "elsewhere" has been the private sector. With some moderately good controls now in place on hospital utilization and pricing, medicare has turned its attention to physicians.

Efforts to deal with the present situation will be played out against the realities of the American mentality. Americans are impatient people who treasure freedom of choice. Nevertheless, real changes are occurring.

Patients are increasingly willing to limit their choices when confronted with significant financial incentives. The traditional fee-for-service physician practice is giving way to a variety of negotiated payment mechanisms. The medial cottage industry of the solo practitioner is rapidly disappearing as larger, more organized settings grow and spread. These are developments that only a few years ago would have been considered unthinkable.

One of the important by-products of this move to increasingly organized practice settings (the growth of managed care, if you will) is that it permits substantive work aimed at improving the quality of medical practice and patient care. this should not be minimized. An exciting development accompanying Medicare's physician reimbursement legislation is the significant increase in the amount of money the federal government is spending on health services research. A large percentage of that money will help not only to clarify those elements which improve health care quality, but also improve the ability to measure that quality.

Another encouraging development is the application of the industrial principles of total quality management and continuous quality improvement to health care settings. This should lead to improved quality of care, and increased provider and patient satisfaction. It should also begin to address the gross inefficiency of much of our health care enterprise.

There are three basic parameters for assessing the performance of our health care system: access, cost, and quality. Issues of access, including the some thirty million Americans who have no health insurance, will almost surely require resolution at the national level. I have just suggested that some very exciting developments are underway to define, measure, and improve the quality of health care services that are rendered. However, for plan sponsors, the continuing major preoccupation is that of cost. What can a plan sponsor do now to get maximum value from their health benefits plan?

I would like to spend the balance of this discussion on some proven cost management techniques that plan sponsors and those responsible for negotiating plan design may find helpful. Let me say, however, that the potential for savings

depends on the underlying health care utilization pattern of the particular covered population. I would also emphasize that the competence and integrity of the organization and individuals providing these various services is absolutely critical to their success. Unfortunately, we have seen many vendor organizations promise much and deliver little. The time that your college or university spends identifying the right vendor and monitoring its performance is simply an essential investment that must be made.

Accurate claims administration if often taken for granted. An administrator that pays claims according to plan documents and contracts is basic. But, poorly performing claims administrators can cost a plan 5 percent or more in excess of what should be paid.

Utilization management. Outside health care professionals, generally registered nurses and physicians; review health care provided to a plan beneficiary before or during the care. Based on experience with our own clients, a properly run pre-admission and current review program can yield savings of 3 percent to 5 percent of inpatient hospital costs. A properly run catastrophic case management program can yield savings of 8 percent to 14 percent of inpatient hospital costs. And, although they are no longer the "rage" a correctly administered second surgical opinion program with targeted procedures and correctly applied criteria to waive the need for a specific second opinion, can yield savings of $1 to $3 for every dollar spent.

These programs have the added advantage of protecting people from the very real, and often expensive, risks frequently associated with unnecessary hospital admissions and procedures. Since they deal with people at times of stress, these services must combine professional rigor with excellent service and "people skills" if they are to be successful.

A significant portion of illness is related to matters of lifestyle. Health promotion programs that are designed to target the requirements of a particular organization, and which are properly conducted, consistently yield savings in excess of their costs. Such programs are very effective in organizations with relatively stable employee populations. Savings generally do not appear until the second or third year of the program, but organizations which view these as longer term investments have consistently experienced savings in health care and absenteeism equal to two to five times the cost of the program.

Employee assistance programs (EAP's) provide counselors to employees for counseling on a wide variety of problems. These are sensitive services which must be conducted by experienced professionals. Savings can be dramatic. For

example, one of our clients, a large defense contractor, experienced a four to one return on its employee assistance program alone as a result of reduction in employee health claims, even greater reduction in the claims of dependents, and a decrease in absenteeism.

A variety of so-called "carve out" programs have been developed to manage specialized benefit areas, such as mental health, substance abuse, and prescription drugs. These programs can produce good, and often spectacular results. Again, the key to success is in the excellence of execution.

Finally, a wide variety of arrangements operating under the rubric "managed care" offer the opportunity for better control of plan costs and, at times, improvement in the quality of health care.

Managed care arrangements redefine the organization of medical care and the relationships between providers and purchasers of health services. Managed care arrangements include health maintenance organizations (HMO's), preferred provider organizations (PPO's), exclusive provider organizations (EPO's), gate keeper PPO's, point-of-service (POS's), and a bewildering proliferation of variations.

Managed care has come a long way from the original staff model and prepaid health plans of the 1940's which were viewed as a communist plot by the medical establishment.

As organized and contractually determined medical delivery systems, managed care organizations have the potential to improve clinical quality, increase customer satisfaction, and manage costs.

From a cost containment viewpoint, managed care does work. The price increase of premiums for HMO's over the past six years has averaged about six percentage points lower than that for the insurance industry as a whole. Cost containment results bare a direct relationship to the type of management ranging from 9 to 10 percent increases for staff model HMO's to 18 to 20 percent for PPO's. This compares with 22 to 25 percent for unmanaged indemnity plans.

Once again, excellence in execution is the key to success. Those of you who are tracking the quality improvement movement in America may be aware that W. Edwards Deming, has described excessive medical costs as one of the "seven deadly diseases" or organizational success in this country. We are in the midst of a revolution in the way health care is organized, financed, valued, and perceived in this nation. While we struggle for improvement, much can be done on a day-to-day basis to improve the value each plan sponsor receives for dollars spent on health benefits. Health benefits cost can be managed in a businesslike way or left to run out of control. Sound management requires good data for planned performance, sound interpretation, and constant attention.

IV. AN OVERVIEW OF HIGHER EDUCATION LEGAL ISSUES PAST AND PRESENT

A. Seminal Legal Developments of the Past Twenty-Five Years Effecting Higher Education Collective Bargaining

B. Twenty-Five Years of Seminal Legal Developments in Higher Education Collective Bargaining

C. Campus Bargaining and the Law: The Annual Update

AN OVERVIEW OF HIGHER EDUCATION LEGAL ISSUES PAST AND PRESENT

A. SEMINAL LEGAL DEVELOPMENTS OF THE PAST TWENTY-FIVE YEARS EFFECTING HIGHER EDUCATION COLLECTIVE BARGAINING

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Inspired by political correctness, one might be tempted to begin by criticizing the title of the panel for its use of the term "seminal." Why should key legal developments be defined by reference to male reproductive biology? The title is, however, not misplaced because in the cases discussed below, most of the judges, lawyers, and litigants were of the male persuasion. They could not help it; and these developments are therefore seminal only by happenstance.

Today the legal landscape in higher education differs markedly from that of twenty-five years ago. In trying to capture some of those differences, we have selected for analysis several of the central court decisions and trends which have shaped recent legal life in the academy. Many readers will find these cases familiar on an individual basis. Perhaps something new might be captured in discussing them together. My fellow presenter at this session will offer news about Yeshiva, the confidentiality of tenure files, due process, and arbitration. My task is to address some major developments concerning free speech, faculty governance, agency fees, and discrimination. Because I have just ten years' experience in higher education law, I will only pretend to authority on the fifteen years preceding that. Nonetheless, here are some candidates for the top legal developments affecting faculty members, their universities, and their unions.

FREE SPEECH

Connick v. Myers. The first nominee is a case not directly involving a professor or a university, but which has nonetheless had substantial impact on the academy. Down in New Orleans back in 1980, assistant district attorney Sheila Myers became dissatisfied with some decisions made in the office, including her proposed reassignment. She sent a

survey around to her fellow attorneys asking, among other questions, whether they were affected by the transfers, supportive of introducing an office grievance procedure, or pressured on any occasion to work in political campaigns. District attorney Harry Connick promptly fired Ms. Myers. She then sued, alleging violation of her free speech rights protected by the First Amendment.

In just three years the dispute made its way to the U.S. Supreme Court, which ruled against Myers in a 5-4 decision in 1983. 461 U.S. 138. The Court articulated in its opinion a new hurdle to public employees who allege that they have suffered retaliation because of their outspokenness -- they must prove that the subjects they were addressing were of public concern rather than personal in nature. Now Justice White, who wrote the majority opinion, claimed that this was not a new standard but rather was derived from prior case law. I personally do not believe him, nor did the four dissenting Justices. The decision in Connick marked a palpable change in the weather regarding the First Amendment rights of faculty members in public colleges and universities.

Let me digress a moment. Some people may benefit from a word of explanation about why Connick only covers public institutions. This is because the First Amendment states that "the government shall make no law" abridging freedom of speech. Public universities are, of course, arms of government. Private universities and other private employers cannot by definition violate the First Amendment, and thus may do as they please (this latter generalization having, of course, many qualifications).

University professors tend, as we all know, to be outspoken on many matters. They have well developed skills of analysis and communication, and can bristle under the imposition of authority. Faculty members speak out forcefully and often on issues they consider fundamental to the health of their institutions. Yet when the focus of their concerns is on departmental matters, or their own appointments, or, in one case, even the appointments of their colleagues, they run the risk of dismissal. A court may construe their interest as only of private concern, not public importance. The application of Connick to higher education can immunize from legal redress the violation of principles of sound academic governance and academic freedom. Thus an English professor who complained about the denial of tenure to a colleague at Georgia State University and who thereafter suffered reduced salary increases was held to have addressed only a private matter, not one of general or public concern. He had no recourse under the First Amendment. The effects of Connick are real, they are serious, and they are lasting.[1]

Several solutions come to mind for the Connick problem, from the faculty member's perspective. The first is to wait for a new Supreme Court to narrow the ruling, or hope that the lower courts will be inclined to try. The second, even more whimsical than the first, is to frame all criticisms of university policy and administrators in terms of national issues -- to wit, "My dean is more narrow-minded than even [here insert name of local or national political figure]."

I offer, however, no guarantees that this will magically transform the speech into a matter of public concern. The third and most realistic solution is to develop and rely on a strong campus climate for academic freedom so that outspoken critics will not be targeted for penalty, regardless of the precise scope of legal protections.

AGENCY FEES

Any subject which the Supreme Court has addressed, on average, every five years in the past twenty-five, must be viewed as a major topic in labor law. The Court has issued a series of rulings analyzing the collection of agency fee payments from employees in a bargaining unit who decline to join the union. These cases balance union and individual interests. On one side is the union's right to financial support for its services from people who would otherwise receive a "free ride" and, on the other, weighs the non-member's constitutional right not to be forced to associate with the union more than is absolutely necessary. Our twenty-five year time frame takes us back to Abood v. Detroit Board of Education, 431 U.S. 209 (1977), in which the Court ruled that the AFT could indeed extract agency fees from non-members over their objections.

Subsequent cases have refined, in excruciating but still insufficient detail, the types of union expenses which the objectors must pay and the procedures for calculating the sums and collecting them. As a general matter, the closer an expense may be linked to the processes of negotiating and enforcing a contract in the particular bargaining unit, the more likely it is to be chargeable to the objecting non-member. I will spare you the details here, but many different types of union expenses have come under scrutiny. Unions are obliged to maintain more careful financial records than twenty-five years ago, and to justify the amounts of their agency fees to objecting non-members. This is undoubtedly a pain in the neck, but the financial returns can be substantial and good record-keeping and business detail can have salutary general benefits.[2]

FACULTY GOVERNANCE AND FACULTY UNIONS

Yet another major development for higher education, this time specific to higher education, was the 1984 Supreme Court decision Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271. Curiously, Knight began primarily as an agency fee case, in which objecting non-members challenged financial practices of their faculty union in Minnesota. An added claim, secondary in the early stages of the litigation, concerned the exclusion of non-members from required "meet and confer" meetings. A Minnesota state law mandated that meet and confer sessions be conducted only by members of the union and the administration. The subjects to be discussed did not cover collective bargaining, but rather various professional matters. Some faculty members who had not joined the union challenged their exclusion from the meet and confer sessions on constitutional grounds, but the Supreme Court rejected

their claim in a closely divided vote. Justice O'Connor wrote for the majority (so perhaps this is not a seminal development after all). She explained that a necessary predicate to the Court's reasoning was the existence of a state law establishing the exclusion. The state legislature could, if it so chose, give the union an enhanced voice in formal institutional deliberations of a professional nature. The non-members remained free to write individual letters, but they could not demand a role in the meet and confer sessions. O'Connor observed that the Court had recognized no constitutional right of faculty members to participate in university governance. The dissent viewed the statute as unjustifiably stifling the voices of non-members in speaking on matters of academic policy, a sphere they felt that the union could not constitutionally control.[3]

What have been the consequences of the Knight decision? Some readers may know that in 1984, debate over the case proved very divisive within AAUP. That rift now seems to have healed. On a broader scale, the decision has had little practical consequence, because no other state has, to my knowledge, a statute like the Minnesota one confining participation in meetings to discuss educational policy only to union members. The situation in Minnesota remains, again to my knowledge, unchanged.

The conceptual and theoretical impact of Knight may be broader, in giving faculty unions new confidence in controlling discussions of academic policy or in contributing to the alienation of many faculty members from the concept of unionism. It may have undermined, again on a theoretical level, collegial concepts of the university -- perhaps less in pitting faculty against faculty but rather in strengthening the deference given to administrative (or legislative) decisions on how universities ought to operate. Let me illustrate this with a mental exercise. Replace the statute in Knight dictating the participants in discussions of academic policy with a new statute forbidding any formal faculty involvement in institutional governance. The new law, presumably anathema both to unionized and unorganized faculty, would pass legal muster under the principles announced in Knight. A law banning faculty senates, for example, would not, in my judgment, be good for higher education. Accordingly, from my perspective, neither was Knight a good result.

DISCRIMINATION LITIGATION

Twenty-five years ago, litigation by an unsuccessful tenure candidate challenging the adverse decision was a rare species of litigation. It is today ever so much more common, largely because of the federal statutes forbidding employment discrimination. When Title VII of the Civil Rights Act was passed in 1964 outlawing discrimination on the basis of race, sex, religion, or national origin, Congress specifically excluded colleges and universities from its reach. This changed in 1972, when Congress amended Title VII to forbid discrimination by institutions of higher education and government employers. The twentieth anniversary of the

application of this major discrimination law to colleges and universities came in March, 1992, and I think the occasion deserved more attention.

What has changed? More lawsuits are indeed being filed. Barbara Lee and George LaNoue counted an average of 34 reported judicial decisions annually during the 1980's, up from an average of 15 annually in the 1970's. These figures are, moreover, only the reported decisions and do not include cases that were settled or resolved by an unpublished order.[4] Some courts have taken the step, again hard to imagine twenty-five years ago, of awarding tenure.[5]

However, LaNoue and Lee found that the universities were winning about four out of five cases decided by judges. Yet persistent salary disparities between faculty men and women, between white and black faculty, remain. Everyone can think of several women and minorities who are prominent in senior administrative posts, but they are prominent only because of the scarcity elsewhere. Only 14 of the 175 accredited law schools have women deans. Women medical school deans can be counted on one hand. Women faculty remain disproportionately concentrated in lower ranks, in positions ineligible for tenure consideration, and in temporary and part-time positions.

Problems persist in large measure because of the inadequacy of the existing enforcement mechanisms. The three federal agencies charged with correcting discrimination in universities are the EEOC, the Office of Civil Rights in the Department of Education, and the Office of Federal Contract Compliance Programs in the Department of Labor. On isolated occasions, an employee of one of these agencies may be of help to someone claiming discrimination in the academy. However, I would be hard pressed to identify any substantial improvement that any of these agencies has achieved. One major midwest university apparently did not submit for five years affirmative action reports required annually by the Office of Federal Contract Compliance Programs. No one even noticed.

The other enforcement route is individual litigation, but the costs, delays, and personal toll are prohibitive. In one case, a woman litigating over a denial of tenure was awarded a new trial by an appellate court <u>fifteen</u> years after the original decision. In another, a decade has passed since the adverse decision, but the faculty member's case has not progressed beyond the preliminary question of whether her EEOC charge was filed on time. These are appalling, and perhaps extreme situations, but they serve to illustrate that individual litigation is a daunting means for pursuing redress for the discrimination that remains in the academy.

Perhaps twenty-five years from now, a balanced interpretation of the First Amendment will have been mutually accepted by public employers and their employees; objection to the payment of agency fees will have disappeared as all workers come to value their unions' efforts on their behalf; the courts (if they still exist) will have accepted the concept of faculty governance as important in its own right;

discrimination in colleges and universities will be examined only in history books; and seminal developments will have been replaced by germinal ones.

ENDNOTES

1. Ballard v. Blount, 581 F.Supp. 160 (D.Ga. 1983), aff'd mem. 734 F.2d 1480, cert. denied 469 U.S. 1086, See generally, Finkin, M.W., "Intramural Speech, Academic Freedom, and the First Amendment," 66 Texas Law Review 1323 (1988).

2. See generally, Franke, "Steps for Complying with Agency Fee Requirements: A Practical Guide for Unions," in Power Relationships on the Unionized Campus, Proceedings of the Seventeenth Annual NCSCBHEP Baruch Conference, Douglas, Joel, ed. (New York: Baruch College, CUNY, 1989), pp. 76-83 (written before the Lehnert decision from the Supreme Court).

3. See Van Alstyne, W., "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review," 53 Journal of Law and Contemporary Problems 79, 143-5 (Summer 1990).

4. LaNoue, G., and Lee, B., Academics in Court: The Consequences of Faculty Discrimination Litigation (Ann Arbor: University of Michigan Press, 1987), p. 23.

5. E.g., Brown v. Boston University, 891 F.2d 337 (1st Cir. 1989), cert. denied 110 S.Ct. 3217 (1990).

AN OVERVIEW OF HIGHER EDUCATION LEGAL ISSUES PAST AND PRESENT

B. TWENTY-FIVE YEARS OF SEMINAL LEGAL DEVELOPMENTS IN HIGHER EDUCATION COLLECTIVE BARGAINING

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Beginning approximately twenty-five years ago, the employment relationships between faculty members and institutions of higher education began what has been a largely unreversed trend toward increased scrutiny and external intervention by courts and labor boards. Many faculties began to use the law to protect and sanctify their efforts to form unions. Also, many faculty members, especially women and minorities, unwilling to accept the decisions adversely affecting their employment opportunities, began increasingly to take their grievances to court. The effects of these two phenomena --just emerging twenty-five years ago -- are very much with us today.

In the mid-sixties and early seventies, a considerable number of states enacted public sector bargaining legislation applicable to a wide range of public institutions including publicly funded colleges and universities. In 1970 in Cornell University, the NLRB reversed long-standing precedent to extend its jurisdiction to higher education labor relations, thereby giving organizing in the private sector a major boost.[1] By the very early 1970's, the academic personnel at the City University of New York and the State University of New York had organized as had the faculties of Rutgers University and the New Jersey State Colleges. Similarly, the faculties of Connecticut's University, its State Colleges and its Community Colleges were all organized. Similar organizing occurred in most states where legislation made it possible. By the end of the decade, the faculties of nearly 100 private colleges or universities had opted for collective bargaining, and even larger numbers of public sector faculties had elected unions. By 1979, more than three hundred public institutions of higher education were engaged in formal collective bargaining with their faculty. More than 130,000 professors in all were unionized.[2]

This interest in collective bargaining on the part of college and university faculty members was not hard to

understand. Faculty members, like other employees, are concerned about their salaries and about job security. During the 1970's especially, this natural concern was heightened by a pronounced shrinkage of the economic resources available to higher education.[3] Faculty salaries had fallen behind the rate of inflation to a greater extent than for American workers generally.[4] University management was preoccupied with cutting budgets. Junior faculty members found their prospects for tenure bleak or nonexistent, and all faculty members found themselves robbed of their individual bargaining power by a tight job market. These developments understandably exacerbated the natural tensions in faculty-administration relations, and faculty influence in the educational enterprise declined in the process.[5]

These two developments -- the NLRB's decision in Cornell University and the enactment of state public sector bargaining legislation -- had a profound impact on a large segment of higher education -- an impact which remains with us today. The public sector bargaining relationships established in the late sixties and early seventies are still in place today, controlling the labor relations of the affected institutions and in many cases permanently altering the relationship between the institutions and the state government by putting in place forceful and well-financed faculty unions.

In 1972 there were two other developments which began or symbolized the increasing extent to which higher education labor relations were to come under increasing scrutiny. First, the Supreme Court decided two cases which essentially established the constitutional due process rights of public sector faculty. Second, Congress amended the 1964 Civil Rights Act to extend the prohibitions against job discrimination to colleges and universities. This amendment came in response to widespread concern about employment discrimination in educational institutions -- especially sex discrimination.

In Board of Regents v. Roth, 408 U.S. 564, the Court held that an untenured faculty member was not entitled, as a matter of constitutional right, to a statement of reasons and a limited hearing before being denied tenure. In Perry v. Sinderman, 408 U.S. 593, decided the same day, the Court held that a tenured faculty member was entitled to notice of charges and a hearing before his tenure could be taken away, and, more significant, proof that he had tenure did not depend alone on explicit assurances, but could be drawn from the relationship taken as a whole.

Although the Roth decision throttled the budding constitutional claims of the untenured, the Sinderman decision underscored the protections extended to tenured faculty.[6] In retrospect, what may be most significant about these decisions is that they got to the Supreme Court at all. The determination and energy which propelled these cases forward was a symptom of the extent to which faculty members were resorting to the courts to undo decisions which they did not like. The whole debate about whether an untenured faculty member was entitled to a statement of reasons may seem almost quaint in some quarters today. But it shows the changes that were going on -- from a system in which the termination of

one's employment after six or seven years need not even be explained to the affected individual, to one in which it could be attacked in court.

The course toward increased regulation of higher education labor relations was not entirely uninterrupted. In 1980, the Supreme Court decided NLRB v. Yeshiva University, 444 U.S. 672, effectively blocking further collective bargaining in the private sector. The decision remains a fascinating -- probably unique -- judicial look at the relationships between faculty and administration in higher education. The result mirrored the debate over collective bargaining which had gone on within academe.

The Yeshiva majority's conclusion that faculty are managerial employees is as easily explained as a disapproval of collective bargaining as by resort to any clear legal principles. and Justice Brennan's forceful dissent makes clear his view that faculty members are just as entitled to the protections of collective bargaining as are other employees of large enterprises.

For ten years, the Labor Board rejected the argument that the traditional faculty role in matters of academic governance made them managers or supervisors ineligible for "employee" status under the Act. The Board recognized that in their governance role, faculty members were fulfilling their responsibilities as professionals and were not functioning as representatives of management.[7] The Board's approach was well-summarized by then Board Member Kennedy:

> [T]he influence which the faculty exercises in many areas of academic governance is insufficient to make them 'managerial' employees. Such influence is not exercised 'in the interest of the employer,' but rather is exercised in their own professional interest. The best evidence of this fact is that faculty members are generally not held accountable by or to the administration for their faculty governance functions. Faculty criticism of administration policies, for example, is viewed not as a breach of loyalty, but as an exercise in academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedom. Conversely, university administrations rarely consider themselves bound by faculty recommendations.

Northeastern University, 218 N.L.R.B. 247, 257 (Member Kennedy concurring).

In Yeshiva, a five Justice majority reversed the Board and held that the faculty of Yeshiva University were "managerial employees." The majority relied on the participation of faculty members in personnel decisions, curriculum decisions, and decisions relating to the establishment of systems for grading students, admission and matriculation standards, academic calendars and course schedules. It found that faculty recommendations were so

generally followed that they "effectively determined" important decisions in these areas. This, the majority found, was sufficient to deny the faculty the right to bargain with the protection of the National Labor Relations Act.

In his dissenting opinion, Justice Brennan accused the five member majority of predicating its decision on an idealized view of the university, one which in Brennan's view at least, did not comport with reality:

> The Court's perception of the Yeshiva faculty's status is distorted by the rose-colored lens through which it views the governance structure of the modern day university. The Court's conclusion that the faculty's professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decision making that is a vestige of the great medieval university. But the university of today bears little resemblance to the 'community of scholars' of yesteryear. Education has become 'big business,' and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization. The past decade of budgetary cutbacks, declining enrollments, curtailment of academic programs, and increasing calls for accountability from alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decision making process. 444 U.S. at 702-3 (Brennan, J. dissenting).

Though arguably the Yeshiva decision was applicable only to those presumably few institutions whose faculties exert "absolute" control over academic policy,[8] it has in fact operated far more broadly. The decision has been construed by the Labor Board to confer managerial status on all faculties which play a significant role in curriculum matters such as the determination of course content, core curriculum requirements, grading standards, and the like.[9] The NLRB has even held that a faculty which secures its input in academic matters through collective bargaining itself is thereby converted into a group of managerial employees with no rights under the NLRA. College of Osteopathic Medicine and Surgery, 265 NLRB 295 (1982).

Although governance structures and practices vary considerably among institutions, virtually all higher education faculties play a necessarily important, if not always decisive, role in such basic academic matters. Because of the Yeshiva decision and its broad construction by the Labor Board, faculty organizing in the private sector came to a halt, and more than twenty faculty bargaining representatives lost their bargaining rights.[10]

As more faculty members took their tenure cases to court, the tenure process itself -- long considered private and unreviewable -- came increasingly under scrutiny. In order

to press their claims of discrimination, faculty plaintiffs asserted a need for access not only their own tenure files but those of colleagues as well. Colleges and universities resisted this, citing everything from a breach of confidentiality to incursions into academic freedom. It is a measure of the deference still accorded academic decision-making that the walls did not finally come tumbling down until 1990, eighteen years after Congress had applied the Civil Rights Act to academe.[11]

One of the most persistent arguments against the disclosure of confidential tenure recommendations was that it would dissuade faculty members from giving honest opinions and thereby interfere with academe's quest for quality. In the notorious Dinnan case, the Court of Appeals for the Fifth Circuit pungently dismissed this argument, while Dinnan languished in jail. Observing that "[S]ociety has no strong interest in encouraging timid faculty members to serve on tenure committees," the court stated:

> No one compelled Professor Dinnan to take part in the tenure decision process. Persons occupying positions of responsibility, like Dinnan, often must make difficult decisions. The consequence of such responsibility is that occasionally the decision-maker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. If the decision-maker has acted for legitimate reasons, he has nothing to fear. In re Dinnan, 661 f. 2d 426, 432-33 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982).

After the issue had been percolating around the federal courts for at least ten years, it reached the Supreme Court. In University of Pennsylvania v. Equal Employment Opportunity Commission, 493 U.S. 182 (1990), a unanimous Court rejected the University of Pennsylvania's contention that it was privileged to withhold from EEOC scrutiny "peer review materials that are relevant to charges of racial or sexual discrimination in tenure decisions."

At issue in University of Pennsylvania was the EEOC's attempt to gain access to what the University termed "confidential peer review information." This included, specifically, (1) confidential letters written by the complainant's evaluators; (2) the department chair's evaluation; (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure; and (4) comparable portions of the tenure-review files of certain male faculty members whom the complainant asserted received more favorable treatment than she.

The University argued that the materials were protected by a "qualified common law privilege" or alternatively by a "First Amendment right of 'academic freedom.'" The Court rejected both contentions, putting the issue largely to rest.

Addressing the University's claim of a common law privilege against disclosure, the Court noted that when Congress extended Title VII to higher education institutions in 1972, it "expose[d] tenure determinations to the same enforcement procedures applicable to other employment decisions." Those procedures accord the EEOC access to "relevant" evidence. Congress did "not carve out any special privilege relating to peer review materials, despite the fact that [it] was undoubtedly aware...of the potential burden that access to such material might create."

The Court readily acknowledged that "universities and colleges play significant roles in American society;" and that "confidentiality is important to the proper functioning of the peer review process under which many academic institutions operate." But this must be weighed against the critical governmental interest in "ferreting out" discrimination in institutions of higher education. If a tenure decision has been affected by unlawful discrimination the pertinent evidence "is likely to tuck away in peer review files." And in the absence of any specific exemption in the statute, the University's interests must give way to the EEOC's ability to secure access to this obviously relevant evidence.

The Court also rejected the University's claim that the peer review materials are protected from disclosure by a First Amendment right to academic freedom. the Court noted that the cases relied upon by the University,[12] involved direct governmental attempts to "control or direct the content of speech engaged in by the university or those affiliated with it." In contrast, the First Amendment infringement complained of by the University of Pennsylvania is "extremely attenuated:"

> [The University] argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach. <u>To verbalize the claim is to recognize how distant the burden is from the asserted right</u>.

The Court noted also that the claim of injury from disclosure was "speculative." The University made the familiar claim that without the assurance of confidentiality there would be a chilling effect on the evaluators on whom a university must rely. But the Court noted that some disclosure occurs anyway in the normal course of things, so that the disclosure sought by the EEOC was just "incremental." moreover, the Court was not ready to "assume the worst about those in the academic community:"

> Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or

unfairness. Not all academics will hesitate to stand up and be counted when they evaluate their peers.

With this decision, the claims of confidentiality are, for the most part, lost. We can expect future faculty discrimination plaintiffs to be allowed essentially free access to comparable tenure materials.

Two recent developments with a potential affect on the future course of discrimination litigation are worth mentioning in conclusion.

During the period when more and more faculties were embracing collective bargaining and when Congress was opening the door to claims of discrimination in the tenuring process, still another Supreme Court decision impeded the extent to which contractual grievance procedures could be used effectively as vehicles for the review of discrimination claims. the Court's 1974 decision in Alexander v. Gardner Denver, (415 U.S. 36 1974) held that an employee who takes his discrimination claim to arbitration under a collective bargaining agreement is entitled to a trial de novo in federal court, whatever the outcome of the arbitration. The decision effectively dissuaded virtually all employers, including colleges and universities, from the arbitration of employment discrimination claims. The assumption was that any voluntary system of arbitration of discrimination claims would simply give an employee two bites at the apple.

This assumption appears to have been largely undercut by the Supreme Court's decision last term in Gilmer v. Interstate/Johnson Lane Corp. 111 S. Ct. 1647 (1991). to the surprise of many in the labor and employment bar, a divided court compelled the arbitration of an age discrimination claim, relying on an arbitration clause contained in a securities registration application. The Court had recently held that other statutory claims were susceptible to compulsory arbitration. Relying on those decisions the Court placed the burden on the plaintiff to show that Congress intended to prohibit the waiver of a judicial forum for ADEA claims. The court found no such intent and rejected Gilmer's claims that arbitration was inconsistent with the "statutory framework and purposes of the ADEA."

The Gilmer majority also dismissed the argument that Gardner-Denver was controlling. first, it held that unlike the case before it, Gardner-Denver involved the arbitration of a contract dispute by a labor arbitrator who was not authorized to resolve statutory claims of employment discrimination. Second, the court noted that Gardner-Denver arose in the context of union representation where there is always a potential tension between collective bargaining representation and individual statutory rights. And finally, the Court noted that Gardner-Denver was "not decided under the FAA (Federal Arbitration Act) which...reflects a 'liberal federal policy favoring arbitration agreements.'" (Quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 [1985]).

There are a number of uncertainties in the wake of Gilmer.[13] But the Court's preference for the use of alternative dispute mechanisms in handling discrimination claims is clear, and this may well give a boost to the arbitration of such claims. The Civil Rights Act Amendments of 1991 contain a clause favoring the use of ADR techniques, the impact of which remains a subject of debate.

Set against this potential impetus for the arbitration of discrimination cases are two provisions of the recently enacted Civil Rights Act Amendments which are likely to make tenure discrimination litigation more attractive to plaintiffs.

First, the law now allows jury trials in Title VII cases alleging intentional discrimination and also permits compensatory and punitive damages over and above back pay. In addition, in a provision likely to have a particularly great effect on faculty tenure cases, the amendments revise the Supreme Court's decision in Price Waterhouse v. Hopkins, 109 S.Ct. 1775(1989). That decision held that a plaintiff who proves that sex was a "motivating" factor, even though not the only factor in an adverse employment decision, established a claim for discrimination and shifts the burden of proof to the defendant. The court also held, however, that the defendant could avoid all liability if he could show that he would have made the same decision based on non-discriminatory reasons. The amendments codify the Court's holding that a plaintiff can prevail by showing that discrimination was a motivating factor. under the amendments, however, employers cannot avoid liability by showing that they would have reached the same decision anyway, though if they do make that showing, the plaintiff will be limited to injunctive relief and attorneys fees as a remedy.

Whatever the impact of these and other factors, it appears that the trend toward increased legal involvement in higher education labor relations will continue unabated.

ENDNOTES

1. Cornell University, 183 N.L.R.B. 904 (1970). Interestingly, the Board's action came at the initiative of the university administration which believed it would be better off with its labor relations regulated by the National Labor Relations Board than by the New York State Labor Relations Board.

2. National Center for the Study of Collective Bargaining in Higher Education and the Professions, Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education, 1979, i-ii. Since the Yeshiva decision, organizing has continued in the public sector.

3. See, e.g., Kemerer and Baldridge, Unions on Campus, 1975:

> As long as the number of students continued to increase every year, jobs were plentiful, salaries were rapidly rising, and institutions were

expanding both their facilities and services. Now, however, the massive boom has leveled off, and job security and salary increases have become prime concerns of faculty and are contributing to widespread unionization.

For some of the literature discussing the economic status of higher education in the 1970's, see E. Cheit, The New Depression in Higher Education, 1971; W. Jellema, From Red to Black? The Financial Status of Private Colleges and Universities, 1973; Kemeny, "The University in Steady State, Deadalus, 87 (Winter, 1975).

4. During the seventies faculty salaries increased at a slower pace than the salaries paid to American workers generally and did not keep pace with inflation. As of the 1978-79 academic year, real faculty salaries, adjusted for inflation, were 13.6 percent below their 1972 levels. Hansen, "an Era of Continuing Decline: Annual Report on the Economic Status of the Profession, 1978-79," 65 AAUP Bull. 319, 323-324 (1979). See also Dorfman, "Report on the Economic Status of the Profession 1976-1977," 63 AAUP Bull. 146, 148-149 (1977). Real faculty salaries experienced a "modest increase" in 1982-83, but remained constant in 1983-84. "Bottoming Out? The Annual Report of the Economic Status of the Profession, 1983-84," 70 AAUP Bull. 3 (1984).

5. "A number of critical changes -- the weakened job market, less research funds, and the encroachment of outside pressure groups -- have diminished faculty influence over decision processes in most institutions. These changes have resulted in restricted budgets, frozen salaries, the elimination of departments, and the execution of major decisions over the strong objections of faculties that feel increasingly impotent." J. Baldridge, et al., Policy-Making and Effective Leadership 95 (1978).

6. It is well to remember that both Roth and Sinderman arose under the Due Process Clause of the Constitution and as such have no direct application to private sector institutions.

7. See e.g., C.W. Post Center of Long Island University, 189 N.L.R.B. 904 (1979); Northeastern University, 218 N.L.R.B. 247 (1975); New York University, 205 N.L.R.B. 4 (1973); Adelphi University, 195 N.L.R.B. 639 (1972).

8. As described by the Yeshiva majority:

> [The] authority [of the Yeshiva faculty] in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. they effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged and the location of a school. 444 U.S. at 686.

9. See Livingstone College, 286 N.L.R.B. No. 124 (1987), where the Board held the faculty to be ineligible to engage in collective bargaining even though there was no tenure system, and the faculty had no imput into salary or other personnel matters. The Board held the faculty to be "managerial" because of its "substantial authority with respect to curriculum, degree requirements, course content and selection, graduation requirements, matriculation standards, and scholarship recipients." 286 N.L.R.B. No. 124.

10. National Center for the Study of Collective Bargaining in Higher Education and the Professions, Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education, Table 13, (January 1987).

11. The courts reacted to the efforts to block disclosure in a variety of ways. See Keyes v. Lenoir Rhyne College, 552 F. 2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904 (1977) (ordering that the interests of the plaintiff be balanced against those of the College and declining to allow production of comparative tenure files); In re Dinnan, 661 F.2d 426 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982) (declining to find any common law or First Amendment protection against the disclosure of tenure review material); Gray v. Board of Higher Education, 692 F.2d 901 (2d Cir. 1982) (ordering a balancing test, but finding that the balance tilted in favor of production); EEOC v. University of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983) (ordering a balancing test and requiring the EEOC to show a "particularized need" for the disclosure of tenure review materials); EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986) (finding no protection for tenure review materials and declining to require any balancing test).

12. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.") Adler v. Board of Education, 342 U.S. 485, 511 (1952) (academic freedom is central to "the pursuit of truth which the First Amendment is designed to protect." Douglas, J. dissenting.); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (First Amendment confers on colleges and universities the right to "determine for itself on academic grounds who may teach." Frankfurter, J. concurring; emphasis added).

13. In reaching its result the Court skirted an issue which could arguably have dictated the opposite result. Section 1 of the Federal Arbitration Act withholds the Act's coverage from "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The dissenters would have held that this provision barred the enforcement of Gilmer's agreement to arbitrate. The majority did not address the issue directly because it was not raised in a timely manner. It observed, however, that Gilmer's arbitration agreement was between Gilmer and the New York Stock Exchange and so was arguably not contained in a "contract[] of employment." The impact of this exclusion on future agreements to arbitrate employment disputes remains confused and unsettled.

AN OVERVIEW OF HIGHER EDUCATION LEGAL ISSUES PAST AND PRESENT

C. CAMPUS BARGAINING AND THE LAW: THE ANNUAL UPDATE

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INTRODUCTION

The past few years have witnessed substantial judicial involvement in collective bargaining at the federal and state levels. A number of these court decisions have had a significant impact on both the academic process and collective bargaining in higher education. This paper will review some of those judicial decisions and comment on their implications to collective bargaining for higher education.

FAIR SHARE

In May, 1991, the Supreme Court handed down a very important decision in the case of Lehnert v. Ferris Faculty Association.[1] The Lehnert case decided a constitutional issue and, consequently, it is applicable to public sector universities. In Lehnert the Court addressed several previously undecided issues concerning the chargeability of certain union activities in determining a fair share fee under an agency shop arrangement.[2] In announcing the Supreme Court's decision in Lehnert, Justice Blackman set forth a three-part test to be applied in determining whether an expenditure may be chargeable. To be viewed as chargeable, an activity (1) must be "germane" to collective bargaining activities, (2) must be justified by the government's vital policy on labor peace and avoidance of "free riders" who benefit from the union's efforts without paying for its services, and (3) must not significantly add to the burden on free speech which is inherent is allowance of an agency or union shop.[3]

In applying this three-part test, the Court allowed the following activities to be chargeable:

(1) a pro-rated share of the costs associated with the collective bargaining activities of the National Education Association ("NEA") and its

state affiliates' that are not directly related to the objectives of the bargaining union and NEA program expenditures destined for other states,

(2) expenses incurred by the State affiliates publications that are germane to collective bargaining,

(3) those portions of a union newsletter that concern teaching and education generally as well as professional development and other information that is neither political or public in nature,

(4) participation of delegates at state and national union conventions, and

(5) expenses incident to strike preparation even though a strike itself would have been illegal.

The Court disallowed the following types of expenses after applying the three-part test:

(1) costs for lobbying or other political activity unrelated to contract ratification or implementation,

(2) a general union program designed to secure funds for public education in the state,

(3) litigation unrelated to the objector's own bargaining unit, and

(4) union public relations efforts designed to enhance teachers' image in general.

The Court also reasoned that lobbying expenses that are chargeable are to be limited to those supporting contract ratification and implementation.[4]

Although Lehnert sets forth a comprehensive three-part test, other fair share issues have been addressed by both federal appeal courts and state courts. A significant decision was recently rendered in February, 1992, by the Third Circuit in Hohe v. Casey.[5] Although it was rendered after Lehnert, the Court did not address Lehnert because there were no Lehnert issues involved. The Third Circuit's decision in Hohe v. Casey addressed Pennsylvania's agency shop law as it was being applied in the state AFSCME bargaining unit.[6] The Court in Hohe put forth five significant holdings in its lengthy decision.

First, the Court held that the Pennsylvania statute requiring an employee or employer to deduct fees regardless of any possible constitutional flaws in the union's fair share procedure is not itself unconstitutional. The Court reasoned that the law requiring that the Union set up a constitutional

procedure was intended to keep the employer out of the middle man role in determining if the Union procedure meets constitutional standards.[7]

Secondly, the Court held that a section of the Pennsylvania statute which requires employees to arbitrate their fair share challenges and makes the arbitrator's decision final and binding is unconstitutional. The Court based its decision on the theory that the state was requiring the arbitration of constitutional claims and that a state is prohibited from impeding an individual from enforcing his constitutional rights in a court of first instance.[8]

Thirdly, the Court held that the use of the "local presumption" does not meet the information disclosure right of Chicago Federation of Teachers, Local 1 v. Hudson.[9] The local presumption is a scheme that unions have been using throughout the country to avoid the cost of auditing local union accounts. It is used where agency fees are collected by the parent body, in this case a statewide AFSCME council, and rebated in part to local unions to fund local activities. It is based on the factual supposition that a local union, which generally provides direct service to the bargaining unit, and does not engage in non-chargeable activities, will spend at least the same proportion of its expenditures as the parent body. In this case, the AFSCME Council had over 300 locals to which it rebated $1.46 million dollars. The Court stated that AFSCME's use of the local presumption did not pass constitutional muster under Hudson.[10]

A fourth holding of Hohe might affect the use of agency fees calculated as a percentage of wages. AFSCME charged dues in the amount of one percent of wages, and an agency fee of about .9 percent of wages. The plaintiff argued that because non-member higher wage earners received no greater benefit from the collective bargaining activities than lower wage earners, they were being charged more than the "pro rata" share of the bargaining costs in violation of Hudson. Here, plaintiffs became ensnared by their own cleverness. The suit was a class action on behalf of all non-members. The Appeals Court, therefore, saw a conflict within the class, which presumably included high and low-wage earners [i.e., if the high wage earners' fee was lowered, the low-wage earners fee might be raised]. Consequently, the Court redacted the District Court's finding that the percentage was proper because it was uniform, and remanded for the possible creation of sub-classes.[11]

Finally, the Court addressed the plaintiff's complaint that AFSCME's figures on chargeable and non-chargeable activities were not certified by an independent audit. The Court agreed with the plaintiff that an independent audit is required by Hudson, but rejected the plaintiffs' claims that they were entitled to damages. The Court reasoned that the presence or absence of an auditor's verification would not affect the actual amount of money spent on chargeable and non-chargeable activities.[12]

In Belhumeur v. Labor Relations Commission, the Massachusetts Supreme Judicial Court ruled, based on the First

Amendment of the United States Constitution, as well as the Massachusetts Constitution, that a challenge to a fair share fee is not entitled to an independent audit of a union determination of expenses chargeable to agency fee payers.[13] The Court, following numerous federal decisions, held that the fair share fee challengers' First Amendment rights do not extend to a requirement that the union's fair share fee appointment be audited independently because the agency shop fee is not paid to the union until the challenge is resolved. The Court reasoned that the holding of fair share fees in escrow until the challenge is resolved protects the challenger from having his constitutional right abridged.[14] In addition, the Court stated that the plaintiff had failed to identify a state constitutional right infringed upon by the absence of an independent audit.[15] The actual holding in the case was an affirmation of the State Labor Relations Commission's refusal to issue a complaint on an unfair practice charge.[16]

The Court of Appeals of Indiana analyzed an NEA-type fair share fee collection plan in the case of Fort Wayne Area Education Association v. Aldrich.[17] In this case, the Court found that generally the fair share fee notice and collection methods were constitutional.[18] In addition, the use of the "local presumption" was approved, but there was a significant factual difference between Aldrich and Hohe local presumption. In Aldrich, the local union expenditures were apparently categorized and the record certified by an independent auditor.[19] The Court also rejected the plaintiff's argument that a union should have to meet a higher burden of proof than the usual preponderance of the evidence standard. The plaintiffs in Aldrich urged that a union should be required to prove its chargeable expenditures by "clear and convincing" evidence.[20]

On the subject of audits, we can certainly glean from these cases that a fair share fee assessment will more easily gain approval from the judiciary if an independent audit is performed.

THE TEMPLE UNIVERSITY PRECEDENT

In the fall of 1990, the faculty at Temple University in Philadelphia, Pennsylvania went on strike.[21] The Temple University contract had expired on June 30, 1990, and the faculty struck on September 4, 1990. On September 22, the University declared an impasse and implemented its last offer. On September 24, the University announced that if classes did not recommence by october 1, 1990, all classes taught by striking faculty would be cancelled for the fall semester. On September 26, Temple University filed a complaint to enjoin the strike in the Philadelphia Common Pleas Court.[22] After four days of hearings, the court enjoined the strike and ordered negotiations to continue. The Court enjoined the strike pursuant to the Pennsylvania Public Employee Relations Act,[23] which allows a Court to enjoin a public employees strike only when the strike poses a "clear and present danger to the health, safety and welfare of the public."[24] Pursuant to the Court order, the faculty returned to work on October 3, and although negotiations did continue, an agreement was not reached and ratified until February 14, 1991.

Pennsylvania is reputed to lead the nation in teachers' strikes and, thus, a large body of Pennsylvania law exists involving strikes by public school teachers in basic education. Two rather clear legal principles have been developed in this area. The first principle requires that, in applying statutory standards of clear and present danger to the health, safety and welfare of the public, the court must find a danger that is normally not incident to the strike by the type of public employee involved. Secondly, the Court must find that the danger to the public must be real or actual and that a strong likelihood exists that the harm will, in fact, occur.[25] Prior to the Temple case, there had not been a court decision in Pennsylvania which established the standards in which a strike in higher education could be enjoined.

During the Temple strike situation, sixty percent of the classes were meeting. In addition, Temple is located in the Philadelphia area which is teeming with colleges and universities which provide available alternatives for Temple students. Nevertheless, Judge Lerner seized upon the significant impact that the continuation of the Temple strike would have upon the City of Philadelphia as a primary basis for enjoining the strike.[26]

First, Judge Lerner held that education, from the elementary level to the graduate level, is "as vital to the health, safety and welfare of this nation as oil, as any other commodity."[27] He noted that the American educational system is "in crisis" and that Pennsylvania has a strong public policy to equalize educational opportunities for the traditionally disadvantaged[28] and for minority groups. Judge Lerner emphasized that half of Temple's student body comes from Philadelphia and that many of those students are disadvantaged.

Lerner especially emphasized the reliance of the Philadelphia City Schools on Temple for its teachers and student teachers. Of the Temple education students that would be expected to graduate, thirty to fifty percent would find jobs in the Philadelphia area. Of the 3,000 students in the University's College of Education, 1,500 of them have a relationship with the Philadelphia School District as student teachers, providers of adult education and language educators.[29] He even mentioned the almost $1 million loss of revenues the City of Philadelphia would sustain if the strike did not end.

Judge Lerner concluded that the University's threat to cancel classes for the semester if they did not meet before October 1 was legitimate from an educational point of view. In addition, Lerner also accepted the University's argument that the students could not absorb the semester's material in any less time. As a result, Lerner concluded that the deprivation to a substantial number of students of an entire semester's work constituted a clear and present danger to the community. He also cited the effect of the strike on Temple state appropriations, jeopardy to its research grants, the students' loss of financial aid for failure to meet state or federal financial aid requirements, and a loss to the community of the programs and resources that Temple provides.

The Temple faculty immediately sought a supersedeas from the Pennsylvania Commonwealth Court but were denied. An appeal was filed with the Commonwealth Court but the appeal was not argued until after the strike was settled. Consequently, the Commonwealth Court seized upon the strike settlement to declare the case moot and thereby avoided ruling on the merits of the case. Temple filed a petition for appeal with the Pennsylvania Supreme Court and was joined in that petition by virtually every other labor union involved in public higher education, including APSCUF, the Pennsylvania Federation of Teachers, the Pennsylvania State Education Association, the Pennsylvania Social Services Union, AFSCME and the SEIU affiliate. Unfortunately, on March 23, 1992, the Supreme Court declined to hear the appeal.[30] The Supreme Court's denial to hear that appeal leaves only the standards set forth by Judge Lerner to aid in determining when a strike may be enjoined.

DAMAGES UNDER TITLE IX

The United States Supreme Court recently decided whether damages are available under Title IX for a sexual harassment charge in the case of Franklin v. Gwinnett City Public Schools.[31] In Franklin, the plaintiff alleged that while she was a high school student, a man named "Hill," a teacher and coach, engaged in the following conduct: (1) sexually oriented conversations; (2) forcibly kissed her in the school parking lot; (3) telephoned her and asked her to meet him socially; and (4) on three occasions asked teachers to excuse her from class and subjected the plaintiff to coercive intercourse in his private office.[32] The plaintiff sued Gwinnett City Public Schools on the ground that the School District was aware of Hill's harassment of her and other students and took no action. Hill had resigned in 1988 on the condition that the School District drop the investigation and take no further action against him. The plaintiff's suit for damages was brought under Title IX. The District Court dismissed the suit on the ground that damages are not available under Title IX and the decision was confirmed by the Eleventh Circuit.[33]

The Supreme Court held that damages were available under Title IX. The Supreme Court reasoned that a right to sue exists under Title IX pursuant to Cannon v. University of Chicago.[34] The Court noted that as long ago as Marbury v. Madison, it has held that the country will cease to have a government of laws if there is no remedy for denial of a vested legal right. Consequently, the Court stated that it would preserve the existence of a necessary and appropriate remedy unless Congress manifested a contrary intent in enactment of Title IX. The Court found no such congressional intent.[35]

The Justice Department filed a brief in the Franklin case urging that the Supreme Court limit any remedy to back pay and prospective relief. Applying this argument to the facts in Franklin would result in the plaintiff receiving nothing. The plaintiff was a student and not entitled to back pay. In addition, Hill had resigned and the plaintiff was no longer

in the Gwinnett School District system. As a result, the Supreme Court rejected that argument and held that damages would be available.[36]

ARBITRATION OF GRIEVANCES AFTER THE EXPIRATION OF THE LABOR CONTRACT

The united States Supreme Court recently ruled in a 5-to-4 decision that an employer need not arbitrate a grievance that arose long after the expiration of a collective bargaining agreement.[37] Previously, in NLRB v. Katz, the Supreme Court had held that an employer commits an unfair labor practice if, without bargaining to impasse, it affects a unilateral change of an existing term or condition of employment.[38] Subsequently, in Hilton v. Davis Chemical Company, the NLRB held that arbitration provisions are not covered by the Katz Rule; that is, that after expiration of a labor contract and before bargaining to impasse, the employer may indicate that it will no longer arbitrate grievances.[39] In Noldev Brothers v. Bakery Workers, Local 358, the Supreme Court ordered an employer to arbitrate a grievance that arose following the expiration of the collective bargaining agreement because the grievance involved the payment of severance pay and the dispute concerned interpretation of the entire contract.[40] The Court in Noldev recognized a presumption in favor of those contract arbitrations unless it is negated expressly or by clear implication.[41]

The recent Litton case purports to interpret Noldev. Litton holds that a grievance arising after contract expiration "arises under the contract" only in three circumstances: (1) when it involves facts and occurrences that arose before expiration; (2) when an action taken after expiration infringes a right that accrued or vested under the contract; or (3) when, under normal provisions of contract interpretation, the disputed contractual right survived expiration of the remainder of the agreement.[42] Three of the dissenting justices asserted that the new rule requires the Court to reach the merits of the underlying dispute in order to determine whether or not the dispute should be submitted to arbitration.[43] Moreover, Justice Stevens, the fourth assentee, asserted that the issue of whether the grievance arose under an expired contract should first have been submitted to the arbitrator.[44]

THE LANDON-GRIFFIN ACT AND UNION ELECTIONS

Several unions involved with higher education represent only employees of state governments or agencies affiliated with state governments to such an extent that the unions are deemed to be instrumentalities of the state. Consequently, such unions are not subject to the Federal Labor Management Reporting and Disclosure Act (LMRDA) that governs the internal affairs of labor unions.[45] However, some unions involved with higher education are governed by LMRDA because they represent private sector employees or because they are affiliated with unions representing private sector employees. For those

covered, the United States Supreme Court decision in Masters, Mates and Pilots v. Brown is of some concern.[46] Under the LMRDA a union is required to comply with all reasonable requests of any candidate to distribute by mail or otherwise, at the candidate's expense, campaign literature.[47] The United States Court of Appeals for the Third Circuit has held that a union may make rules regarding the distribution of campaign literature and, if reasonable, they will be binding on the campaign.[48] The Fourth Circuit, on the other hand, rejected such a deference to union rules, and required the union to look specifically at the request made by the candidate and to grant the request if reasonable.[49] In a unanimous decision, the Supreme Court adopted the Fourth Circuit standard and held that any reasonable request by the candidate must be honored.[50] In Brown, the candidate had asked the union to mail out his campaign literature, at the candidate's expense, but was denied because union rules prohibited pre-convention mailings. The union had allotted 90 days after the convention for the mailing of literature, prior to the election.[51] The Supreme Court found an intent in the LMRDA to offset the inherent advantage of incumbency of a union officer. Because the candidate is required to pay costs, the Court found that there can be no real burden on the union.[52]

DUTY OF FAIR REPRESENTATION

In Airline Pilots v. O'Neal, the United States Supreme Court, in an unanimous decision, further insulated unions covered by federal labor law from damages for breach of the duty of fair representation in connection with strike settlements.[53] In this case, a group of airline pilots asserted that the union had breached its duty of fair representation because the settlement that it reached with an appointed trustee of an airline in bankruptcy was worse than a simple surrender.[54] Justice Stevens, writing for the Court, opined that the "arbitratory, discriminatory or in bad faith" standard laid down by Vaca v. Sipes, requires that the plaintiff show that the union's behavior is so far outside a wide range of reasonableness as to be irrational.[55] Stevens compared the relationship between courts and labor unions to that between the courts and the legislature, saying that any substantive examination of a union's performance must be highly deferential. He stressed the importance of policy favoring "peaceful settlement of labor disputes" as well as the "importance of evaluating the rationality of the union's decision in light of both the facts and the legal climate" confronting negotiators when the decision was made.[56] By reaching a settlement, the union produced prompt access to a share of new jobs and avoided the costs and risks of major litigation. As a result, the Court reasoned that even a bad settlement may be more advantageous in the long run than a good lawsuit.[57]

EMPLOYMENT DISCRIMINATION AND THE FEDERAL ARBITRATION ACT

A recent U.S. Supreme Court decision involving arbitration and the Age Discrimination in Employment Act (ADEA)[58] could have a significant impact on collective

bargaining in higher education. By way of review, the Supreme Court in Alexander v. Gardner-Denver Company, held that arbitration under a collective bargaining agreement does not prevent an employee from pursuing an employment discrimination claim in Federal court under Title VII.[59] In 1991, the Supreme Court in Gilmer v. Interstate/Johnston Lane Corp. held that a requirement in an individual employment contract that all disputes arising out of employment, including age discrimination allegations subject to ADEA, would have to be honored.[60] The majority opinion by Justice White for seven members of the Court held that there is nothing wrong with subjecting statutory claims to mandatory arbitration under the Federal Arbitration Act. The Court noted that there was no reason to believe that the arbitration provision in the employment contract had been coerced from the employee.[61] The Court specifically did not rule on the plaintiff's argument that the arbitration procedure available to him under the New York Stock Exchange Arbitration procedure would be inadequate to address the statutory age discrimination claim.[62]

The Gilmer decision does not indicate in any way that Gardner-Denver is no longer good law. However, the 1991 Civil Rights Act provides that, where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including arbitration, is encouraged in an employment context.[63] it is important to note that the 1991 Civil Rights Act and Gilmer raise the issue of whether Alexander v. Gardner-Denver will be overruled someday to allow mandatory arbitration of Title VII claims. To date, the Supreme Court has not addressed this issue.

JUDICIAL REVIEW OF ARBITRATION DECISIONS

An interesting decision came out of the New York Supreme Court, Appellate Division, in late 1991, concerning review of arbitrators' awards.[64] In Young, the Court reversed an arbitrator's decision holding that discharge was too severe a penalty for a University hospital therapist who was fired for having used the same syringe to draw blood from several clinically ill patients after being warned of the dangers of the practice. The arbitrator had held that the discharge was inappropriate due to the employee's good work record for eight years, and changed the discharge to two months' suspension.[65] The New York Court applied traditional highly pro-arbitration standards stating:

> an arbitration award must be sustained if it is neither violative of a strong public policy nor totally irrational and if the arbitrator did not exceed a specifically enumerated limitation of his or her power.[66]

However, the court noted that the arbitrator's finding that discharge was inappropriate violated the state's strong public policy of providing high quality, efficient and effective hospital services, in a clean, safe and sanitary environment.[67] It therefore reversed the award.

ENDNOTES

1. Lehnert v. Ferris Faculty Association, 111 S.Ct. 1950 (1991).

2. In the 1977 case of Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Supreme Court upheld the constitutionality of an agency shop provision for public employee unions. The Court recognized in Abood and subsequent cases that not all union activity may necessarily be chargeable in determining a fair share fee to be assessed against non-union members.

3. Lehnert v. Ferris Faculty Association, 111 S.Ct. 1950, 1959 (1991).

4. Id. at 1959.

5. Hohe v. Casey, 956 F.2d 399 (3rd. Cir. 1992). The Third Circuit has jurisdiction over Pennsylvania, New Jersey, Delaware and the Virgin Islands.

6. This case arose quickly because litigation brought by the national Right to Work Fund challenging aspects of Pennsylvania's agency shop law, which was passed in 1988, was still pending when Lehnert was decided.

7. Hohe v. Casey, 956 F.2d 399 at 403 (3rd. Cir. 1992).

8. Id. at 408.

9. Chicago Federation of Teachers, Local 1 v. Hudson, 475 U.S. 292 (1986). Hudson requires a union to inform prospective fair share challengers of at least the majority of categories of expenditures that it is making.

10. Hohe v. Casey at 411.

11. Hohe at 413.

12. Hohe at 415.

13. Belhumeur v. Labor Relations Commission, 580 N.E.2d 746 (Mass. 1991).

14. Id. at 748-749.

15. Id. at 749.

16. Id. at 749.

17. Fort Wayne Area Education Association v. Aldrich, 585 N.E.2d 6 (Ind. App. 3rd Dist. 1992).

18. id. at 13.

19. Id. at 12.

20. Id. at 10-12.

21. Temple Association of University Professionals, AFT Local 4531 v. Temple University, 135 Pa. Commonwealth Ct. 426, 582 A.2d 63 (1990).

22. Id. at 63.

23. Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §§1101.101 - 1101.2301.

24. Id. at 64.

25. Id. at 66.

26. Id. at 66-67.

27. Temple University v. Temple Association of University Professionals, AFT Local 4531, AFL-CIO, 21 Phila. 204, 8 D. & C. 4th. 17 (1991).

28. Id. at 210.

29. Id. at 211-212.

30. Temple University v. Temple association of University Professionals, AFT Local 4531, _____ Pa. _____, 605 a.2d 335 (1992).

31. Franklin v. Gwinnett City Public Schools, 117 L.Ed 2d 215 (1992).

32. Id. at 215.

33. Id. at 216.

34. Cannon v. University of Chicago, 441 U.S. 677 (1979).

35. Franklin v. Gwinnett City Public Schools, 17 L.Ed. 2d 215 221 (1992). The Franklin Court also looked at Congress' recently passed Civil Rights Remedies Equalization Act of 1986, 42 U.S.C. §2000d-7, which among other things, reversed Grove City College v. Bell, 465 U.S. 555 (1984) without attempting to restrict the Cannon decision. The Court noted "Congress surely did not intend for Federal monies to be spent to support the intentional actions it sought by stature to proscribe."

36. Franklin v. Gwinnett City Public Schools, at 224-224.

37. Litton Financial Printing Division v. NLRB, 111 S.Ct. 2215 (1991).

38. NLRB v. Katz, 369 U.S. 736 (1962).

39. Hilton v. Davis Chemical Company, 185 NLRB 241 (1970).

40. Noldev Brothers v. Bakery Workers, Local 359, 430 U.S. 243 (1977).

41. Id. at 255.

42. Litton Financial Printing Provision v. NLRB, 111 S.Ct. 2215, 2225 (1991).

43. Id. at 2228.

44. Id. at 2231-2232.

45. 29 U.S.C. §401 et seq.

46. Masters, Mates and Pilots v. Brown, Slip op. #89-1330 (February 20, 1991).

47. 29 U.S.C. §411.

48. Donovan v. Metropolitan District of Carpenters, 797 F.2d 140 (3rd Cir. 1986).

49. Brown v. Lowen, 857 F.2d 216 (4th Cir. 1988).

50. Masters, Mates and Pilots v. Brown, Slip op. #89-1330 (February 20, 1991).

51. Id. at 2-3.

52. Id. at 8.

53. Airline Pilots v. O'Neal, Slip op. #84-1493 (March 19, 1991).

54. Id. at 4.

55. Id. at 1 citing Vaca v. Sipes, 380 U.S. 171, 190 (1967).

56. Id. at 12.

57. Id. at 13.

58. 29 U.S.C. §621 et seq.

59. Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974).

60. Gilmer v. Interstate/Johnston Lane Corp., 111 S.Ct. 1647 (1991).

61. Id. at 1650-1651.

62. In two cases decided after Gilmore, the Court of Appeals for the Sixth and Fifth Circuits have held that Title VII claims can be subjected to mandatory arbitration. See Willis v. Dean Winter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991); Alford v. Dean Winter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991).

63. The Civil Rights Act of 1991, 42 U.S.C. §1981 et seq.

64. State University of New York v. Young, 566 N.Y.S.2d 79 (1991).

65. Id. at 80.

66. Id. at 80.

67. Id. at 80.